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# The Market for Federal Judicial Law Clerks

*Christopher Avery*†
*Christine Jolls*††
*Richard A. Posner*†††
*Alvin E. Roth*††††

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† Associate Professor, Kennedy School of Government, Harvard University.
†† Professor of Law, Harvard Law School.
††† Judge, U. S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago.
†††† Gund Professor of Economics and Business Administration, Harvard University.

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## INTRODUCTION

In September of 1998 the Judicial Conference abandoned its most recent attempt to regulate the timing of interviews and offers in the process for hiring federal judicial law clerks. In September of 1999 most prominent law schools abandoned or cut back their attempts to regulate the time at which faculty recommendation letters could be sent. Thus, the law clerk hiring process now gets underway at the beginning of the second year of law school, roughly two years before the clerkship positions themselves would begin.

What is going on here, and what, if anything, should be done about it? To answer the first question, we present a wide range of new and systematic empirical data from judges and students about their experiences in the market for federal judicial law clerks, and we show how the problems of this market resemble problems in a broad set of other markets in the economy. To answer the second question, about possible reform of the law clerk market, we describe some of the unique features of this market that make reform particularly challenging and consider whether there are ways to adapt the reforms that have succeeded in other markets to these unique features.

Federal judicial clerkships represent an important point of entry to many of the most sought-after positions in the legal profession. Every year top students from elite law schools compete for positions with judges who can help them to land Supreme Court clerkships, plum teaching jobs, and competitive law firm positions.[1] At the same time, federal judges depend heavily on their law clerks to aid them with their workload.[2]

The essential problem with how this important market presently functions is that it is difficult to establish the time at which the market will operate. Any time that is set will tend to "unravel" because judges have an incentive to "jump the gun," hiring slightly earlier than their competitors, to get the pick of the candidates.[3] Students have strong reasons to accept early offers from judges, among other things because they will not know what their other options may be, and also because it is, quite simply, difficult and uncomfortable to hold off a federal judge. Judge Kozinski explains the incentive on the judge side: "From the judge's perspective, making an early offer allows him to . . . attract candidates who might not otherwise seriously consider him for a clerkship."[4] "[T]he ability to make offers early" is "a very important bargaining tool."[5] As described by one respondent to our survey of federal appellate judges:

> I live in, and my office is located in, a country town . . . . [I]t is not every young man or woman who will come here to live; indeed, most won't. . . .
>
> [Initially] I did not employ law clerks until they had finished the first term of their senior year of law school. . . . I soon found out

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1 See generally Alex Kozinski, *Confessions of a Bad Apple*, 100 Yale L J 1707, 1709 (1991) (describing judges' influence over clerks' future career trajectories).

2 See Patricia M. Wald, *Selecting Law Clerks*, 89 Mich L Rev 152, 153 (1990) (describing the effects of clerk quality on judges' productivity).

3 See Alvin E. Roth and Xiaolin Xing, *Jumping the Gun: Imperfections and Institutions Related to the Timing of Market Transactions*, 84 Am Econ Rev 992, 992 (1994).

4 Kozinski, 100 Yale L J at 1720 (cited in note 1).

5 Id at 1719.

> that it was more and more difficult to get law clerks from the top of the class. . . . But I have found that there are a few people in the top of the class at most law schools who had rather be assured of a job early, even in a town this size, than to wait and enter the contest in becoming clerks for judges in the larger cities with the larger and better-advertised reputations.[6]

The result of this incentive for jumping the gun is a situation in which judges scheme to outmaneuver one another in the effort to hire desirable clerks. Judges accuse their colleagues of "frequenting maternity wards to make sure they get the 'best' clerks."[7] The frenzy of hiring has cast the judiciary into disrepute in some eyes—a concern that judges have often voiced over the years, and a concern that is dramatically confirmed by some of the striking stories told by students in response to our empirical investigation. The process by which clerks are hired has other negative consequences as well, as we describe below.

Part I of our analysis provides a normative framework within which to analyze the market for federal judicial law clerks. There is a complicated economics literature on the efficiency of hiring in markets with timing problems; we attempt to distill the essential components of this literature, which have not been well understood in the existing legal literature on the law clerk market, and we highlight some special features of the economics literature that bear on law clerk hiring specifically. Our normative framework provides a context within which to view our empirical results.

A fundamental goal of our project has been to gain an improved understanding of how the market for federal judicial law clerks actually operates. There are many rumors and opinions about this market, and few hard facts. To remedy the lack of systematic knowledge, we have surveyed both judges (including Supreme Court Justices) and students about the law clerk hiring process. The little empirical work that presently exists is quite dated (particularly in this rapidly changing market) and also is much less comprehensive than our effort.[8] We use our results to present a broad empirical picture of the market from both judges' and students' perspectives.

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6 1999 Judge Survey #26d. For details on our citation practices for survey responses, see Part II.B.2.

7 Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J Legal Educ 150, 152 (1986).

8 A survey of judges was conducted in the early 1990s, as was a survey of law students. See Edward R. Becker, Stephen G. Breyer, and Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 Yale L J 207, 212 & n 16 (1994) (describing survey of federal appellate judges to determine whether they would agree to a benchmark starting date for interviews); Lynn K. Rhinehart, Note, *Is There Gender Bias in the Judicial Law Clerk Selection Process?*, 83 Georgetown L J 575, 577–78 (1994) (describing survey of third-year law students).

Part II describes our empirical findings. On the judge side, we surveyed all federal appellate judges in both 1999 and 2000 and received responses from 65 percent of the judges in 1999 and from 54 percent in 2000. This gives us a reasonably comprehensive picture of the law clerk market as viewed from the judge side. We also sought the input of the nine Justices of the United States Supreme Court and received responses from eight of them. On the student side, we conducted surveys in 1999 and again in 2000 about the hiring process. Our results provide a window on how the hiring process is regarded by applicants, how well students are being matched to judges, and how the process is affecting students' decisions to apply for clerkships.

Part III looks at other markets that have had difficulty in establishing the timing of transactions. Markets with such timing problems can be found in a wide range of settings; they include markets for athletic tournaments, markets for medical residents, and markets for social club memberships. Part III attempts to educe from the existing economics literature what has been learned from the extensive study of this other set of markets.

Part IV tackles the question of what, if anything, should be done in the market for federal judicial law clerks. The main possibilities, in their rough contours, are familiar from the existing legal literature: (1) Leave the hiring process unregulated (as at present); (2) Establish start dates for offers and perhaps also interviews (a strategy that has been tried in the law clerk market on numerous past occasions); and (3) Institute some form of centralized matching of judges and clerks. The last approach is the one presently used in the market for medical residency positions (as well as in a variety of other markets). One of the present authors (Roth) was responsible for the design of the centralized matching process presently used for medical residencies.[9]

Because of the diversity of opinion expressed in the existing literature and in our surveys on the matter of reform, we will not try to focus on any one of these three approaches. Rather we shall attempt to describe, in light of the evidence and insights presented in Parts I through III, how each of these approaches could best be implemented. We will then assess each solution's likelihood of success in light of what we know from our evidence and the experience of other markets. Of the possibilities we consider, the most promising appears to be the use of a centralized matching process *for those judges who wish their clerks to be eligible for United States Supreme Court clerkships*, with enforcement of the centralized matching requirement by the Su-

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[9] See Alvin E. Roth and Elliott Peranson, *The Redesign of the Matching Market for American Physicians: Some Engineering Aspects of Economic Design*, 89 Am Econ Rev 748 (1999).

preme Court. We describe this proposal in more detail in Part IV.D below. It is meant to pick up on a fundamental finding of our judge survey responses; the finding is that judges are not and do not perceive themselves to be a homogenous group when it comes to the hiring of law clerks.

## I. A NORMATIVE FRAMEWORK

A natural prerequisite for assessing whether what is happening in the market for federal judicial law clerks is good or bad is a set of normative criteria against which to make that assessment. We begin with the concern most often voiced by judges—that the current process casts the bench into disrepute. We then turn to the question of the efficiency and perceived fairness of the current process of law clerk hiring.

Throughout the discussion it is important to distinguish between two separate, although related, features of the market for federal judicial law clerks. The first is that hiring tends to occur in a rough-and-tumble manner, with judges making short-fuse offers, trying to outmaneuver each other, and so forth. The second, distinct feature is that hiring tends to occur very early in the student's law school career. These two things are related in important ways, of course, but for our normative analysis it is important to distinguish between them.[10]

Throughout our discussion we focus on the market for *federal*, and especially federal appellate, judicial clerkships. We adopt this focus because the market for federal, and particularly federal appellate, clerkships is the market in which most of the problems with which we are concerned have arisen.

### A. Disillusionment with the Federal Bench

From judges' perspective, the biggest concern with the current state of the law clerk market seems to be the disrepute cast upon the bench by the way in which hiring is done. (Judges are also likely to care about some of the other problems we describe below.) Indeed, the impetus for one of the prior reform efforts was an article in *The New York Times* that painted a colorful picture of the judicial "free-for-all" that occurred as judges "behav[ed] like 6-year-olds" in the rush to hire law clerks.[11] One judge likened the process to a "calf

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[10] See Hao Li and Sherwin Rosen, *Unraveling in Matching Markets*, 88 Am Econ Rev 371, 371–72 (1998) (discussing the distinction between strategic behavior in transactions and how early the transactions occur).

[11] See Becker, Breyer, and Calabresi, 104 Yale L J at 209–10 (cited in note 8), quoting David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust*, NY Times B4 (Mar 17, 1989).

scramble," which is "the low point of many western rodeos. A small number of calves are turned loose in the arena, along with a larger number of adolescent cow persons. The latter attempt to seize, subdue and carry out the former. The SPCA [Society for the Prevention of Cruelty to Animals] writes letters to the editor during the following week."[12] (Presumably the "adolescent cow persons" here are the judges.)

The "judicial disrepute" normative perspective on the law clerk market is relatively simple. A system in which hiring occurred in an orderly and respectable manner would be preferable to a system that can be likened to a "calf scramble." The fact that hiring occurs early in the students' law school careers might not be an independent problem on this view; rather it may be merely a symptom of the other problem—that judges are jockeying for position and trying to outmaneuver one another in the competition for the best law clerks.

Other normative criteria turn out to be more complex, as we shall see.

## B. Efficiency

From an economist's perspective, the natural question to ask about the market for federal judicial law clerks is whether it is efficient. A foundation for an efficient market is the ability of market participants to consider and compare the alternatives available in the marketplace.[13] Thus one potential source of inefficiency in the law clerk market is that the "calf scramble" forces judges and students to make choices before they can make real comparisons. A second (related but distinct) potential cause of inefficiency is the early date at which hiring takes place. If the quality of the match between judge and clerk depends on attributes that are not adequately predicted by information available after the first year of law school (and would be better predicted by a fuller law school record), then hiring may be occurring at an inefficiently early time.[14]

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12 Becker, Breyer, and Calabresi, 104 Yale L J at 210 n 8 (cited in note 8) (quoting Judge Alfred T. Goodwin).

13 Roth and Xing, 84 Am Econ Rev at 992 (cited in note 3).

14 Note that salaries are highly regulated in the law clerk market. For recent analyses of matching in contexts in which salaries are flexible, see Hao Li and Wing Suen, *Risk Sharing, Sorting, and Early Contracting*, 108 J Pol Econ 1058 (2000); Wing Suen, *A Competitive Theory of Equilibrium and Disequilibrium Unraveling in Two-Sided Matching*, 31 Rand J Econ 101 (2000). For a discussion of relaxing salary restrictions in the market for federal judicial law clerks, see Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 Md L Rev 129, 167–72 (2000). However, many of the inefficiency results apply both to matching with fixed salaries and to matching with flexible salaries. See, for example, Roth and Xing, 84 Am Econ Rev at 1034–35 (cited in note 3).

We elaborate on these issues below, considering them in the light of several different possible standards of efficiency.

1. Pareto efficiency.

One standard is Pareto efficiency, which says that an outcome is efficient as long as there is no way to make one or more parties better off without making at least one person worse off. Under this standard, the market for federal judicial law clerks is likely to be efficient. The Pareto standard is notoriously limited in its usefulness, for rarely can one make some people better off without making even a single person worse off.[15]

To be sure, it is possible that the law clerk market is suboptimal for all participants. Everyone might be better off if hiring occurred in an orderly manner, at a later time, or both.[16] But it seems more likely that some gun-jumping judges would be made worse off by such a reform, since they would no longer have the bargaining advantage that they seek to get from acting early. (Certainly Judge Kozinski's view in his well-known article *Confessions of a Bad Apple* seems to be that such reform would make him worse off.[17])

Thus, the remainder of our analysis will consider two other, more useful conceptions of "efficiency."

2. Maximizing the "sum total of satisfaction" of judges and clerks.

If the standard of efficiency is not Pareto efficiency but instead some broader notion of maximizing something like "the sum total of the satisfaction" (however measured) of judges and students with their matches, where some parties' gains can be traded off against others' losses, then several arguments suggest that the current market is likely to be inefficient. We first consider the nature of the process and then the distinct issue of the early time at which hiring is done. In both cases, however, the inefficiency we identify may be muted by the fact that the positions in question last for only a short time, and also by the fact that each judge has multiple law clerks, who are plausible substitutes for one another.

*a) The nature of the process.* One benefit of a market is that it brings together many buyers and sellers at the same time, so that they can consider a wide range of transactions.[18] But the present market for judicial clerks is quite narrow: the buyers (of clerks' services) and sell-

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15 See, for example, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J Legal Stud 191, 193 (1980).

16 See Roth and Xing, 84 Am Econ Rev at 1034–35, 1039–40 (cited in note 3).

17 Kozinski, 100 Yale L J at 1708–08, 1719–21 (cited in note 1).

18 Roth and Xing, 84 Am Econ Rev at 992 (cited in note 3).

ers (of those services) typically can consider very few possible transactions. Indeed, as we document below, in many instances the sellers can consider only one possible transaction—the one with the judge who first makes them an offer.[19]

Why are many of the gains of a market lost when participants are not able to consider a range of options? In a market with limited numbers of buyers and sellers, parties are not able to gather information about multiple options and then act on that information to seek out their most preferred alternatives. Choices must be made from a very small set of alternatives and in a very compressed period. Decisions must be reached on the basis of extremely limited information. And if participants try to refine their information, they may not be able to do so in a timely enough fashion, since time spent in ultimately fruitless courtship (for instance, in making an offer that is subsequently refused) means that other candidates will have matched and left the market. All of these features have the potential to introduce substantial inefficiency.[20] In addition, this process may be so unappealing to some clerkship candidates that they drop out of the process altogether.

*b) Early hiring.* The costs of a rough-and-tumble process exist whatever the timing of hiring; even if such a process occurred at the middle or the end of students' third year of law school, the inability of participants to consider a range of options would reduce the ordinary gains from a well-functioning market. The fact that hiring also occurs very early in students' law school career poses a distinct set of problems. These are mostly related to the limited amount of information available when hiring is done early (wholly apart from the informational limitations that result from a chaotic process).

As will be described more fully in Part II, almost two-thirds of the federal appellate judges responding to our survey about the 1999–2000 law clerk hiring season were entirely done with their hiring by January 31 of the applicants' second year of law school. A few students apply for clerkships in their third year, but this is a relatively small number.[21] Thus decisions for the typical judge were based solely on first-year grades and recommendations (since first-semester second-year grades were not yet available), together with the student's record prior to law school.

The problem with such early hiring is that two-thirds of the information about the student's academic record in law school, plus vir-

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19 See Part II.C.1.a.

20 Such inefficiency is examined in simulations motivated by the market for clinical psychologists in Alvin E. Roth and Xiaolin Xing, *Turnaround Time and Bottlenecks in Market Clearing: Decentralized Matching in the Market for Clinical Psychologists*, 105 J Pol Econ 284 (1997).

21 See Part II.B.3.c.

tually all of the information about the student's legal writing, which typically is done in the second and third years, is missing. Realistically, hiring would probably not occur at the very end of the third year even under a reformed system for hiring law clerks, but it could certainly happen sometime during the third year, so that at least the full second-year record would be available. Obviously, assessing the impact of this missing information on the satisfaction of judges and students with their matches is difficult. Is the quality of a student's legal writing well-predicted by the student's first-year grades? How well do students' GPAs at the end of the second year correlate with their first-year GPAs?

It is (for obvious reasons) not very easy to get data on grades, but we do have data from a relatively recent Harvard Law School class, comparing first-year GPA to the GPA for the first and second years together.[22] At most this limited amount of data can offer anecdotal support for any claim, but we think the results are interesting and so mention them briefly. The overlap between the two measures in the top of the class is not small, but neither are the discrepancies. Of the students who were in the top 5 percent of the class (the top twenty-seven students) at the end of the first year, two-thirds of them were in the top 5 percent at the end of the second year. The other students who were in the top 5 percent of their first-year class were (in order of decreasing class rank) twenty-eighth, twenty-ninth, thirty-sixth, forty-second, forty-seventh, forty-eighth, fiftieth, fifty-ninth, and sixty-ninth at the end of the second year. The students who were ranked forty-second, forty-seventh, forty-eighth, fiftieth, fifty-ninth, and sixty-ninth would almost certainly not have been competitive for the very top clerkships had they held those positions in class rank after the first year. The students who took these nine students' place in the top 5 percent by the end of the second year were ranked (again in order of decreasing rank) twenty-ninth, thirty-third, forty-second, forty-sixth, forty-ninth, fiftieth, sixty-ninth, seventy-fifth, and eighty-fourth at the end of the first year. Probably the last seven of these did not have a shot at the very best clerkships based on their first-year grades, even though just one year later they were within the top 5 percent of their class at Harvard Law School. A brief look at the top 2 percent of the class—the pool for the most highly elite clerkships of all—at the end of the first versus the second year shows even greater movement: fewer than half of the students in the top 2 percent at the end of the first year remain there at the end of the second year.

In short, early hiring seems to create a real risk of mismatches in both directions: some students hired for the most competitive clerk-

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[22] The data discussed in this paragraph are on file with the authors.

ships on the basis of first-year standing may prove to be less strong than judges had hoped, and some of the most competitive students may not be identifiable on the basis of first-year grades. It is true that large law firms likewise hire for second-year summer positions—which may turn into permanent positions—on the basis of first-year grades. However, since law firms have a large range of types of work (ranging from the relatively mundane to the complex), hire a large number of associates each year (versus a small number of clerks in the judicial setting), and decide to offer permanent jobs in significant part based on summer performance, errors are likely to be less serious in this market than in the law clerk market.

In assessing the power of first-year grades to predict second-year grades, it should be noted that one cannot be sure what second-year grades would look like if clerkships were *not* decided before these grades come out. One possibility is that students who do not receive clerkships (or who, having received mediocre first-year grades, know that they will not receive clerkships) may throw in the towel and stop trying. Another possibility is that students who *get* clerkships may decide that their future is set and thus that they need not try any more. Either phenomenon would distort second-year grades relative to first-year grades; second-year grades would be a less clear measure of "legal ability" (and of course they may be noisy already). They may also be a less clear measure because of strategic selection of easier courses; such strategic course selection cannot generally occur during the first year because schedules are set without student choice. A thought-provoking implication of these suggestions is that judges who wait longer to hire their clerks may be "fooled" by the high second-year grades of those not hired earlier, as their grades may be artificially inflated by less exertion of effort by students who receive clerkships early and by strategic course selection. But in fact slacking off and strategic course selection by students who do *not* get clerkships seem more likely; students who get clerkships, or at least students who get the most prestigious clerkships, are likely to care about grades for other reasons (graduation honors, Supreme Court clerkships, positions in legal academia), which give them reason not to slack off.

Early hiring does not impose unambiguous costs on the parties. While less information is available, risk-averse parties enjoy some benefit from resolving uncertainty earlier and, in effect, insuring themselves against the possibility that things could turn out badly for them.[23] This story seems most applicable on the student side; for students, things could turn out badly if their law school careers do not progress in the way they might hope. The economic literature on

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[23] See Li and Rosen, 88 Am Econ Rev at 372 (cited in note 10).

matching shows that with risk-averse parties, early hiring may sometimes create benefits.[24] But in other similar contexts we do not seem to think that early transactions for insurance purposes produce a better outcome; for instance, no one argues that students should be admitted to college based on sixth-grade test scores in order to "insure" students against not turning out as well as they might hope. (And we do not think this is only because of the large degree of information loss that would result.) It is equally unclear why such insurance would on balance be desirable in the clerkship setting.

3. Maximizing the "production of justice."

Until now the efficiency discussion has focused on the well-being of the parties to the clerkship match—judges and students. The emphasis has been on achieving "good," or desirable, matches from both sides' perspective. Another conception of efficiency focuses on the overall quality of the legal system and thus on those who are not necessarily market participants. Does the law clerk market maximize the "production of justice" (however defined)? This question can be rephrased: Is failing to match the most desired clerkship candidates to the most desired judges—that is, failing to match in accordance with the parties' preferences—a bad thing or a good thing from the perspective of maximizing the "production of justice"?

If the quality of judicial output is an *additive* function of judges' and clerks' ability, then the matching does not matter, holding constant the aggregate pool of clerks hired. If, instead, the output quality of relatively less desired judges benefits from the input of top clerks more than the output quality of relatively more desired judges does, then "mismatches" are actually *good* for societal welfare. Finally, if the benefit of having a top clerk is greatest for the most desired judges (in other words, the judicial output function is *multiplicative*), then "mismatches" are likely to reduce societal welfare. There are other factors as well; for instance, a top law clerk may benefit more from the coaching of a more desirable judge, and this may produce broader benefits for society as the clerk pursues his or her own career after the clerkship. All in all, it turns out to be quite difficult to say how mismatches affect the overall quality of the legal system. For this reason, we give primary emphasis below to the criterion of maximizing the satisfaction of judges and clerks with the match.

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[24] See id.

### C. Perceived Fairness

Judges and students may care not only about the match that results from the law clerk hiring process but also about the nature of the matching experience itself. Even if Judge *A* and student *B* are quite happy to be paired with one another at the end of the road, if the process of getting to that point was unpleasant, the market may still cause disutility and, thus, may be suboptimal.

We have already discussed judges' distaste for the law clerk hiring process.[25] Our survey results suggest that students may have similar or even stronger feelings. We focus below on a particular form of disutility on students' part. Since it is hard for participants in this market to get good information about one another, various forms of personal well-connectedness may come to play a large role, and students (as well as judges) may perceive this to be unfair. We discuss evidence along these lines in Part II.C.3.

## II. EMPIRICAL RESULTS

### A. A Brief History of the Law Clerk Market

To understand the story told by our empirical evidence, it is helpful first to understand what has gone before. The history of the market for federal judicial law clerks and the attempts to reform it have been described well and fully by others, so we offer only the barest essentials here.[26]

Over the past several decades, the time of hiring of law clerks has moved from the end of the third year of law school to the beginning or middle of the second year. Judge Wald writes of her experience, "I was hired in 1951 as a clerk to Second Circuit Judge Jerome Frank in May of my third year."[27] During the 1999–2000 hiring season, by contrast, the process was well underway by mid-fall of the second year, as documented below.[28]

Each stage in the backward progression in the time of hiring of federal judicial law clerks has been marked by a belief that the market will never move earlier than the present moment—that the process has reached a "natural stopping point" beyond which it will not move. Judge Kozinski, writing in 1991, provides an example:

> [T]he breakpoint for many judges in making clerkship decisions comes around *February or March of a student's second year of*

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25 See Part I.A.

26 For a full account through 1994, see Becker, Breyer, and Calabresi, 104 Yale L J at 208–21 (cited in note 8).

27 See Wald, 89 Mich L Rev at 155 (cited in note 2).

28 See Part II.C.1.b.

> *law school.* At that time several things come to pass. Perhaps most important, the student's third semester grades become available. Also, many students will have developed relationships with members of the faculty by working as research assistants, participating in individual research projects, writing papers or participating in seminars. By that time as well, students will have had a fair opportunity to show commitment to their law reviews by participating in the editing process or doing substantial work toward publication of their comments. For those of us who care about such things—and there are many—law review board elections are conducted around that time.[29]

Of course, hiring has now moved to a point well before Judge Kozinski's "breakpoint."

The past two decades have witnessed a parade of attempted reforms of the market for federal judicial law clerks. These reforms have had in common their inability to solve the problem. The average life of a reform has been about three years.[30] The latest reform effort, begun in 1993, involved the imposition of a March 1 start date and initially appeared promising to its sponsors, who stated hopefully after its first year of operation that although "[w]e entertain no illusions that the March 1 Solution is perfect, [ ] we respectfully submit that, like democracy with all its flaws, it is the best system that anyone has conceived thus far."[31] However, it was this very reform that the Judicial Conference abandoned in 1998 after an acknowledgement that it was "not universally followed and, therefore [ ] not an accurate reflection of the practice in the courts."[32]

Thus, since 1998, there has been no official Judicial Conference policy governing the hiring of federal judicial law clerks. In the first year after the abandonment of the March 1 start date, some law schools attempted to enforce a February 1 start date for sending application materials, including faculty recommendations, to judges, but these efforts were largely abandoned the following year (as well as somewhat ignored in the year in which they were nominally in effect). To learn more about what is presently happening in the market for federal judicial law clerks, we surveyed both judges and students about the process.

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29 Kozinski, 100 Yale L J at 1710 (cited in note 1) (emphasis added).

30 See Becker, Breyer, and Calabresi, 104 Yale L J at 209–15 (cited in note 8) (describing five failed reform efforts over the period from 1978 to 1990); text accompanying note 135 (describing the abandonment of the sixth, most recent reform attempt, begun in 1993, in September of 1998).

31 Becker, Breyer, and Calabresi, 104 Yale L J at 222 (cited in note 8).

32 *Report of the Proceedings of the Judicial Conference of the United States* 38 (Sept 15, 1998).

## B. Survey Design and Response

### 1. Survey of Supreme Court Justices.

In October of 1999 we sent a letter to the nine active Supreme Court Justices asking about their law clerk hiring practices and how these might relate to the hiring practices of other federal judges. The letter came from the judge-author of the present work (Posner) and promised confidentiality to the Justices. Eight of the nine members of the Court responded. We discuss their responses in connection with our analysis in Part IV of possible reforms of the law clerk market and the potential role of the Supreme Court in enforcing these reforms.

### 2. Surveys of court of appeals judges.

In September of 1999 and again in June of 2000 we distributed a survey about law clerk hiring to all federal appellate judges. The judge-author of this Article (Posner) mailed the surveys to all active and senior court of appeals judges.[33] For confidentiality reasons we requested that the judges return their responses to another of us (Jolls) rather than to him. Also, we did not ask for respondents' names, but we did ask for the judge's court (First Circuit, Second Circuit, etc.) and the general timeframe in which the judge was appointed, and from this information it would be possible to identify some judges. We therefore assured judges that identifying information would be shielded from the judge-author of this work as well as kept confidential from the public at large. The 1999 and 2000 surveys were quite similar, although the 2000 version included a few new questions.

The 1999 survey yielded 155 responses from judges, a 65 percent response rate. Of the responses, 103 were from active judges, while 51 were from senior judges. (One respondent did not specify seniority.) This response pattern reflects almost an exact match to the overall proportion of active judges versus senior judges on the bench (161 active, 77 senior), as shown in Table A1 in the attached Data Appendix. The 2000 survey yielded a similar, although slightly lower, response rate of 54 percent, perhaps because some judges were disinclined to bother responding a second time. Again the pattern of responses from active and senior judges (84 and 45 responses respectively) was almost an exact match to the overall proportion of active judges versus senior judges on the bench (again see Table A1). Across individual circuits there was somewhat greater, although not enormous, variation in the response rates, as summarized in Table A1. All surveys that were re-

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[33] A small number of senior court of appeals judges from the Seventh Circuit were not surveyed because the sender of the survey (Posner), a judge on that Circuit, knew that they were no longer hiring law clerks.

turned to us were assigned numbers, and these are what we use to identify particular responses that we quote or rely upon.

As is obvious from the description just given, our judge data embrace only federal appellate judges; they do not include information on federal district court judges or state court judges. While it is true that some of the most elite federal district court and state court judges probably compete with federal court of appeals judges for clerks, the number of such plausible competitors is sufficiently limited, relative to the overall size of the pool of federal district court and state court judges, to justify the limitation of the distribution of our survey to federal appellate judges.

3. Surveys of students.

In surveying students about the law clerk market, we faced a scope problem similar to, although vastly greater in magnitude than, the problem faced for judges. Having decided to focus on federal appellate judges to avoid an enormous survey pool, our interest on the student side was in students who were potential candidates for clerkships with such judges. At some level, though, that group includes every law student in the country, since students serving in federal appellate clerkships hail from an extraordinary number of schools ranging from Detroit Mercy to St. John's University to Louisiana State (LSU) to Harvard.[34] Because it was obviously impracticable to survey every student at every law school in the country, we were forced to make choices about how to narrow the group. One approach, which was the approach taken in the only existing survey of clerkship candidates of which we are aware, is to limit the sample to students serving on the main law review at one of some suitably defined set of "very good" schools (say, schools in the top ten or twenty).[35] The second approach, which is the one we adopted, involves surveying all students, not just members of the main law review, at an even smaller number of schools.

Two empirical factors support our focus on all students, not just members of the main law review, at a smaller number of schools. First, membership in a school's main law review does not appear to be of overriding or even particularly great importance in the selection process of court of appeals judges. Our 2000 judge survey asked judges to rank the following eight factors in order of their importance to the judges' law clerk hiring decisions: law school grades, recommendations from familiar professors, recommendations from other professors, recommendations from past legal employers, recommendations from

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34 See *Judicial Yellow Book* 52, 58, 81, 83 (Spring 2000) (listing these schools as the alma maters of federal appellate clerks).

35 See Rhinehart, Note, 83 Georgetown L J at 577 n 12 (cited in note 8).

current clerks and other "peers," membership in the school's main law review, board position at the school's main law review, and writing sample. (We did not ask judges to rank the importance of the personal interview because it seemed likely to be of substantial importance to almost all of them.) Table A2 in the Data Appendix summarizes the rankings given to membership in the school's main law review. Over half of the judges who provided rankings (55 of 109) said that membership in the main law review was either in the bottom half of factors in terms of importance or was not a factor in their decisions at all. Only six judges said that such membership was the most important of the eight factors to their decisions.

The second empirical factor that supports looking at all law students at a smaller number of schools as opposed to only members of the main law review at a larger number of schools is that students from the four law schools generally considered to be the most competitive (Chicago, Harvard, Stanford, and Yale in alphabetical order) strongly dominate students from the remaining top ten and top twenty schools in their success in landing federal appellate clerkships. (For the top ten and the top twenty lists, we use the (admittedly controversial) *U.S. News and World Report* rankings from 2000. Harvard, Stanford, and Yale are the top three schools according to this ranking; Chicago is sixth.[36])

Table A3 in the Data Appendix presents the number of students from each group of schools serving in federal appellate clerkships according to data from the Spring 2000 edition of the *Judicial Yellow Book*. It is important to emphasize at the outset the limitations of these data: they cover only those judges who choose to report their clerks' schools (approximately one-third do not report), and, much more importantly, the variations in reporting rates across circuits are substantial. As a result of the latter point, the numbers in Table A3 are probably understated (relatively speaking) for the California schools, including Stanford, as well as the Universities of Pennsylvania and Texas, and probably overstated for Chicago, New York University, and Columbia; the reason is that the Third, Fifth, and Ninth Circuits (covering Pennsylvania, Texas, and California respectively) have (along with the Eighth Circuit) the lowest rates of coverage in the *Judicial Yellow Book* (with percentages ranging from 42 to 63 percent), while the Second and Seventh Circuits (covering New York and Chicago respectively) have much higher coverage rates (81 percent for the Second Circuit, 87 percent for the Seventh Circuit).

Despite the limitations of the *Judicial Yellow Book* data, Table A3, coupled with the information in Table A2, provides support for

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36 *US News & World Rep* 73 (Apr 10, 2000).

the approach of looking comprehensively at the very top tier of schools instead of looking only at members of the main law review at a somewhat broader set of institutions. Students from Chicago, Harvard, Stanford, and Yale held 143 clerkships (an average of thirty-six per school), compared to ninety-three for students from the next six schools (an average of sixteen per school) and sixty-eight for students from the remaining ten of the top twenty institutions (an average of seven per school). Note that what is relevant for our purposes is the absolute representation of the schools, not how they fare relative to their student body sizes, since our goal is to get information from the largest absolute number of potential federal appellate clerks.

The remainder of this section provides further detail on how we conducted our student surveys.

*a) 2000 survey of second-year students.* In February of 2000 we distributed a survey about the 1999–2000 law clerk hiring process to all second-year students at Chicago, Harvard, Stanford, and Yale. Surveys were placed in student mailboxes, and students were provided with a stamped, pre-addressed envelope in which to return their responses to one of us (Jolls). Students were assured that no potentially identifying information in their responses would be revealed publicly or even to the judge-author of this work. Students were not asked to put their names on their responses.

We received a total of 294 responses, a 26 percent response rate. Presumably the lower response rate for students than for federal appellate judges reflected the fact that while almost all federal appellate judges hire law clerks, many law students do not apply for federal appellate clerkships. We received 129 responses from students who applied for federal appellate clerkships (and 165 from students who did not; students were asked to return the survey either way), but since we do not know the actual number of students who applied for these positions, we cannot calculate a response rate for the 129 responses. As with the judge surveys, all 2000 second-year student surveys returned to us were assigned numbers, which are used to identify the responses below.

*b) 1999 survey of second-year students.* In March of 1999 we distributed a survey to all second-year students at the four law schools surveyed in 2000 and also to all second-year students at three additional schools, Columbia, Michigan, and Vanderbilt. In contrast to the 2000 student survey, which sought mostly quantitative or categorical information (for instance, "in what month did you apply?," "how many interviews did you do?"), the 1999 survey was largely anecdotal, with mostly open-ended essay or long-answer questions. This survey, administered just as our project was getting underway, provided a natural starting point for our research.

The survey was distributed by multiple means. At schools other than Harvard, it was left in students' mailboxes with instructions to return responses to a drop box at a specified location; at some of these schools the survey was also distributed via electronic mail. At Harvard the survey was left in students' mailboxes, again with instructions to return responses to a drop box; in addition some students received copies of the survey in their large "bundled" classes. As with the 2000 survey, students were not asked for their names and were assured of the confidentiality of any possibly identifying information.[37]

We received a total of 337 responses to the 1999 survey. Table A4 in the Data Appendix provides a breakdown by school and by whether the respondent applied for federal judicial clerkships. (In 1999 we asked whether the student had applied for federal judicial clerkships, appellate or district court level; in 2000 we asked whether the student had applied for federal appellate clerkships specifically. Also, for 2000 we do not have data by school because one school objected to having school identification on the survey in 2000.) In the interest of consistency with the 2000 results, we focus our analysis of the 1999 data on the four schools surveyed in 2000; thus information from the 1999 surveys reported below is from the surveys distributed at Chicago, Harvard, Stanford, and Yale. These schools accounted for 267 of the 337 responses (79 percent) (see Table A4). As above, we assigned an identifying number to each response.

As just noted, our 2000 survey of second-year students asked whether the student had applied for federal appellate clerkships, and only students who had done so were directed to fill out the body of the survey; the 1999 survey asked whether the student had applied for federal appellate or district court level clerkships, and only those who had done so were directed to fill out the body of the survey. In both cases, however, some of the responses by students in the body of the survey may relate to state court applications or (for the 2000 survey) federal district court level applications, even though those were not embraced in the opening question, because the students may have applied for those positions *in addition to* the ones embraced in the opening question. Obviously we could have chosen to limit subsequent questions (such as "When was your first interview?," "When was your first offer of a clerkship?," and "Did you receive other clerkship offers before you rejected your first offer?") to the category of clerkships embraced in the opening question, but this could have produced misleading or incomplete answers, since other opportunities certainly

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[37] At the time of the 1999 student survey, one of us (Posner) had not yet become involved in the project. We interpreted the confidentiality promise to students as requiring that no one other than the original three authors (Avery, Jolls, and Roth) see any potentially identifying information.

might have affected the student's situation in the market for the clerkships covered in the opening question. Nonetheless, the cost of our approach is that the data presented below, while only for students who applied for some sort of federal clerkship—and for 2000 only for students who applied for federal appellate clerkships—may reflect events in other markets as well.

*c) The role of third-year students.* There is a widespread perception (which we shared prior to receiving the contrary results from our 2000 judge survey) that the early time at which clerkship hiring is occurring has significantly increased the frequency of hiring of third-year students, making our focus on second-year students potentially problematic. Dean Anthony Kronman of Yale Law School wrote to the Yale student body about the subject of third-year applications in the fall of 1999, saying that he "suspect[ed] that third year applications will become increasingly routine" and that he "regard[ed] this development as a healthy one."[38] Students would work at a law firm or pursue some other opportunity for a year after finishing law school and then begin a clerkship.

The responses to our 2000 judge survey suggest, however, that judges have not intensified their hiring of third-year students in response to the developments in the clerkship market since the 1998 abandonment of the March 1 start date. In our 2000 survey we asked judges how many third-year students, and also how many post-graduates (candidates who had finished law school), they hired in 1999–2000 and whether these numbers were greater than, less than, or the same as the numbers in previous years. Answers are presented in Table A5 in the Data Appendix. No discernible trend toward increased hiring of third-year students (or post-graduates) appears in this data.

## C. Is the Law Clerk Market Functioning Well?

Our survey results allow us to assess the functioning of the market for federal judicial law clerks within the normative framework developed in Part I above. We first discuss findings related to the efficiency of the clerk hiring process and then turn to findings that bear on disillusionment with the federal bench and the perceived fairness of the clerk hiring process.

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[38] Memorandum from Tony Kronman to the students of Yale Law School (Dec 8, 1999) (on file with authors).

1. Efficiency: Maximizing the "sum of satisfaction" of judges and clerks with the match.

Part I.B above discussed two separate efficiency criteria for assessing the workings of the law clerk market: maximizing the "sum of satisfaction" of judges and clerks with the match, and maximizing the "production of justice." Our survey results do not shed light on the second criterion (which we concluded was less useful in any event), but they have much to say about the first.

*a) The nature of the process.* We first consider the ways in which the nature of the law clerk hiring process impedes maximizing the "sum of satisfaction" of judges and clerks with the match. The biggest problem is that, as noted above, the process does not permit judges and clerks to consider a range of alternatives before making their decisions.

Our survey results provide strong quantitative evidence of the inability to consider a range of options on both sides of this market. The results show in a systematic way how the clerkship market resolves extraordinarily quickly, with judges and students pairing off in an almost frenetic fashion to avoid being left in the cold. The basic chronology, as described more fully below, is that

- interviews lead very quickly to offers (section i below);
- offers produce very quick responses (section ii);
- responses are generally acceptances (section iii); and
- many scheduled interviews are canceled as a result (section iv).

Thus, students and judges tend to pair off quickly with those with whom they have early interviews. As a result,

- many students limit the judges to whom they apply to avoid being paired off early with a less preferred judge (section v); and
- at least some students who might otherwise be interested in clerking avoid the process entirely (section vi).

*(i) First step: interviews lead quickly to offers.* The time between interviews and offers is typically very short, as revealed by responses to our 2000 survey of second-year students. (We did not ask about the gap between interview and offer times in our 1999 survey.) As shown in Table 1, over half of students' first offers of clerkships were made within two days of the offering judge's interview of the student; 34 percent were made at the conclusion of the interview.

**TABLE 1**
**LENGTH OF TIME BETWEEN FIRST OFFER AND INTERVIEW WITH THE OFFERING JUDGE (1999–2000)**

| Time between first offer and interview with the offering judge | % of responding students[a] |
|---|---|
| Offer made at end of interview | 34% |
| 1–2 days elapsed between interview and offer | 23% |
| 3–4 days elapsed between interview and offer | 10% |
| 5–7 days elapsed between interview and offer | 15% |
| 1–2 weeks elapsed between interview and offer | 8% |
| 2+ weeks elapsed between interview and offer | 11% |
| *Total number of responses*: 101[b] | |

*Source*: 2000 Student Survey.

[a] Percentages in this column sum to 101 percent as a consequence of rounding.

[b] 2000 Student Survey #23 did not answer the question about the time elapsed between the student's first offer and the interview with the offering judge, even though this student reported receiving an offer of a clerkship. Therefore we have 101 responses for this question, versus 102 responses for a number of the questions discussed below.

Moreover, our survey results show that the judge who makes the student's first offer typically comes early in the student's interview schedule, as reported in Table 2. In other words, it is not ordinarily the case that students interview with a range of judges and then receive their first offer. As the table shows, 59 percent of first offers came from the first or second judge with whom the student interviewed, and 36 percent came from the first judge with whom the student interviewed.

**TABLE 2**
**INTERVIEW PRODUCING FIRST OFFER (1999–2000)**

| Interview producing first offer | % of responding students[a] |
|---|---|
| First interview produced first offer | 36% |
| Second interview produced first offer | 23% |
| Third interview produced first offer | 19% |
| Fourth interview produced first offer | 8% |
| Fifth or subsequent interview produced first offer | 15% |
| *Total number of responses*: 102 | |

*Source*: 2000 Student Survey.

[a] Percentages in this column sum to 101 percent as a consequence of rounding.

Responses to our judge surveys in 1999 and 2000 also suggest limited time between interviews and offers. As Table 3 shows, approximately three-quarters of active judges started making offers to candidates before they had completed their scheduled interviews.

**TABLE 3**
**THE PRACTICE OF MAKING OFFERS BEFORE COMPLETING SCHEDULED INTERVIEWS**

| **Group of federal appellate judges** | **% of responding judges who began making offers before completing their scheduled interviews** | |
|---|---|---|
| | *1998–1999* | *1999–2000* |
| All judges | 64% | 64% |
| Active judges | 74% | 73% |
| Senior judges | 38% | 42% |
| | *Total number of responses*: 138 | *Total number of responses*: 114 |

*Source*: 1999 and 2000 Judge Surveys.

The reasons for the speed of offer behavior are not difficult to understand. In both 1999 and 2000 we asked judges why they made offers before completing interviews, and many of their explanations explicitly mentioned the fear of losing candidates to other judges. In 1999, seventy-six of the eighty-eight responding judges who started making offers before the completion of scheduled interviews offered reasons for this behavior, and 42 percent of those who offered reasons specifically mentioned competition from other judges. These judges' specific responses are listed in Table A6 of the Data Appendix. The situation in 2000 was similar: fifty-four of the seventy-three responding judges who had started making offers before the completion of scheduled interviews gave their reason for this choice, and one-third of those who offered reasons specifically mentioned the fear of losing candidates to other judges. Again these judges' specific responses are listed in Table A6. Putting both years together, only a single judge mentioned the desire to save time (by not conducting further interviews) as the reason for making offers before the completion of scheduled interviews, while fifty cited competition from rivals. In response to a different question on our judge survey, over half of responding judges in both 1999 and 2000 said that competition influenced the time at which offers were made, as reported in the top panel in Table 4 below. As described in sections ii and iii below, these offers typically lead to quick responses, which are generally acceptances, so making an early offer tends to give a judge a competitive edge.

**TABLE 4**
**FACTS ABOUT JUDGES' MOTIVATIONS FOR EARLY OFFERS**

| | % of responding judges | |
|---|---|---|
| | *1998–1999* | *1999–2000* |
| Competition influenced the time at which offers were made: | | |
| All judges | 53% | 53% |
| Active judges | 59% | 63% |
| Senior judges | 40% | 30% |
| | *Total number of responses*: 140 | *Total number of responses*: 111 |
| An applicant requested that the timetable be moved up:[a] | | |
| All judges | N/A | 46% |
| Active judges | N/A | 53% |
| Senior judges | N/A | 31% |
| | | *Total number of responses*: 115 |
| Timetable was moved up in response to applicant's request:[a] | | |
| All judges | N/A | 48% |
| Active judges | N/A | 48% |
| Senior judges | N/A | 50% |
| | | *Total number of responses*: 52 |

*Source*: 1999 and 2000 Judge Surveys.

[a] These questions were only asked in the 2000 Judge Survey.

In many instances, judges who made quick offers may have been responding to explicit requests by students to speed up their timetables. Our 2000 judge survey showed that 53 percent of active judges reported that an applicant had asked them to speed up the process

because of a pending interview or offer deadline from another judge, as shown in the bottom panel of Table 4.[39] Almost half of those who received such a request moved up their timetables, also as shown in the bottom panel in Table 4.

*(ii) Second step: offers lead quickly to responses.* Not only do interviews lead quickly to offers, but offers lead quickly to responses; this is not a market in which students collect a substantial number of offers and then make their decisions. As Table 5 shows, our 2000 student survey revealed that almost three-quarters of students responded to their first offer of a clerkship within two days of receiving the offer.[40] Clearly this is a market in which events move very quickly with little apparent time to consider multiple options. Indeed, 42 percent of students responded to their first offer immediately.

**TABLE 5**
**TIMING OF STUDENT RESPONSE TO FIRST CLERKSHIP OFFER (1999–2000)**

| Time before responding to first offer | % of responding students (cumulative % in parentheses) |
|---|---|
| Immediate response | 42% (42%) |
| Within 2 days | 29% (71%) |
| 3 days to 1 week | 21% (92%) |
| More than 1 week | 8% (100%) |
| *Total number of responses*: 102 | |

*Source*: 2000 Student Survey.

The reasons for the quick response times by students are again easy to understand. Most obviously, many judges impose explicit response deadlines at the time an offer is made. Among respondents to our 2000 judge survey, 25 percent reported requiring an answer within one day for one or more of their slots, 38 percent reported requiring an answer within forty-eight hours, and 68 percent reported requiring an answer within a week. These numbers are similar to, although slightly higher than, the corresponding numbers from 1999, as shown in Table 6.[41] Student responses colorfully revealed the practice of limited-response-time offers, as shown in Table 7. At least one student at-

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39 We did not ask a similar question in 1999.

40 We did not ask a similar question in 1999.

41 An earlier survey of appellate judges by the Administrative Office of the United States Courts found still more dramatic results regarding the time to respond to offers: "Almost one in six [judges] stated that students should have to respond on the spot." Louis F. Oberdorfer and Michael N. Levy, *On Clerkship Selection: A Reply To The Bad Apple*, 101 Yale L J 1097, 1102 n 18 (1992).

tempted unsuccessfully to gain additional time from a judge: "I asked for 24 hrs. to consult my wife, but [the judge] said he couldn't give me 24 hrs. I guaranteed him I would accept."[42]

**TABLE 6**
**TIME-LIMITED OFFERS AS REPORTED BY JUDGES**

| Time within which response to offer required | % of responding judges | |
|---|---|---|
| | *1998–1999* | *1999–2000* |
| Within 24 hours | 22% | 25% |
| Within 48 hours | 34% | 38% |
| Within a week | 67% | 68% |
| | *Total number of responses*: 108 | *Total number of responses*: 85 |

*Source*: 1999 and 2000 Judge Surveys.

**TABLE 7**
**TIME-LIMITED OFFERS AS EXPERIENCED BY STUDENTS**

| Survey | Comment |
|---|---|
| 1999 Survey #154[a] | A Ninth Circuit judge in California made clerkship offers good for only fifteen minutes. |
| 1999 Survey #105 | [A particular judge] made an offer on the spot with no time to decide. |
| 1999 Survey #159 | [A particular judge] gave [me] 1.5 hours to decide after being given an offer. |
| 2000 Survey #244 | [A particular judge] wanted an answer on the spot. |
| 1999 Survey #118 | [A particular judge] extended an offer only until the next morning. |
| 1999 Survey #108 | [My] second choice judge g[a]ve an exploding offer on the phone (i.e., I had to give an answer by the time I hung up) before [I was] able to call/talk to my first choice judge. |
| 2000 Survey #247 | I had to respond [to a particular judge's offer] by the next morning. |

*Source*: 1999 and 2000 Student Surveys.

[a] This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

42 1999 Student Survey #157.

Even when an offer does not explicitly expire after only a very short period, a variety of implicit pressures operate to press for a speedy response by the student. To begin, some judges make offers to more candidates than they have slots available, with the slots going to the first candidates to accept. Not surprisingly, "[u]sually the clerk applicant accepts on the spot."[43] Interestingly, this sort of strategy is explicitly prohibited by the Harvard Law School Office of Career Services for law firms interviewing Harvard Law School students.[44]

In addition, many students may feel the need to respond to an offer quickly if they think there is some chance they would want to accept because a delayed acceptance might start the relationship off on the wrong foot.

> I had an offer from one judge that I had to respond to during a short period of time, but I was still waiting to hear from my top choice. My top choice called me half an hour before my deadline with the other judge. I was worried that the first judge would be offended that I waited so long to respond to his offer.[45]

> [A particular judge] [m]entioned how, if he were to give an offer to someone and they didn't immediately accept, it would make him wonder if he had made the right choice and 'almost' ma[k]e him want to withdraw it—but he said he didn't do that, said he might give a little time.[46]

> I was frustrated that my top choice judge hadn't even started interviewing when I got my offer. I felt my only choice was to take the offer, as [I] couldn't make the [offering] judge wait 2 weeks on the chance that I might get an offer [from the other judge].[47]

The following striking anecdote suggests that the perception about negative impressions from a delay followed by an acceptance or attempted acceptance is likely to be correct for at least some judges:

> I have an interview scheduled with my most preferred judge ([Judge *C*]) on [later date]. [Judge *D*] calls and wants me to interview on [earlier date]. I ask [Judge *D*] when she would be making

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43 1999 Judge Survey #106. A similar strategy was used in hiring economics professors at Ohio State University in 1970. The university "was authorized to fill six positions, and it made offers to 11 candidates, saying that the offer would remain open only until the first six acceptances were received." Roth and Xing, 84 Am Econ Rev at 1036 n 78 (cited in note 3).

44 See Harvard Law School Office of Career Services 1999 Rules and Requests for Organizations Interviewing Harvard Law School Students Rule 3 ("No offer shall be made conditional upon a student's accepting it before acceptances have been received from other students to whom offers have also been made.") (on file with authors).

45 1999 Student Survey #131.

46 1999 Student Survey #50.

47 2000 Student Survey #12.

> her offers, and she says, "I am going to wait until after I finish all the interviews, talk with my clerks and then decide—so [after the later date of the Judge *C* interview]." So, I go to interview with [Judge *D*] on [earlier date]. I explain that I have another interview scheduled on [later date] during the interview. She calls me on [date prior to later date of Judge *C* interview] with an offer. I like [Judge *D*], but have my heart set on at least getting to interview with [Judge *C*]. Because [Judge *D*] is not willing to wait until at least [later date], I decline saying I would like to interview further before making my decision. [Judge *D*] gets fairly offended and says, "you know, students should withdraw right after the interview if they are not going to accept an offer."[48]

The perception that one is "obliged to accept every offer"[49] is part of the reason that, as explained in the following section, students overwhelmingly respond not only quickly but affirmatively upon receiving a clerkship offer.

*(iii) Third step: responses to offers are generally acceptances—even when other positions would be preferred.* A significant majority (73 percent) of students responding to our 2000 survey of second-year students accepted the first offer they received, as shown in Table 8.[50] Consistent with this evidence—and presumably in large part because of it—almost 70 percent of students who received one or more clerkship offers received exactly one, also as shown in Table 8. Once again, the law clerk market does not appear to be one in which students have the opportunity to consider a range of options before making their decisions.

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48 1999 Student Survey #135.

49 Id.

50 We did not ask a similar question in the 1999 survey.

**TABLE 8**
**THE PRACTICE OF ACCEPTING THE FIRST OFFER RECEIVED (1999–2000)**

| Offer information | % of responding students | Cumulative % |
|---|---|---|
| First offer was accepted (of the 102 students who responded to this question): | | |
| Yes | 73% | 73% |
| No | 27% | 100% |
| Number of offers (of the 101 students who responded to this question and received one or more offers):[a] | | |
| 1 | 68% | 68% |
| 2 | 25% | 93% |
| 3 | 3% | 96% |
| 4 | 2% | 98% |
| 5 | 1% | 99% |
| 6 | 1% | 100% |

*Source*: 2000 Student Survey.

[a] 2000 Student Survey #12 did not indicate the number of offers received but did answer the question about whether the first offer was accepted; thus we have 101 responses here compared to 102 above.

One might respond at this point that students' first offers may often come from their top-choice judges, so that the inability to consider other options is of little consequence for them. Students certainly have some control over the timing of their interviews, and thus (one might argue) they can arrange to interview first with their top-choice judges. It is clear that at least some students attempt to engage in such behavior; as one student wrote in response to our 1999 survey,

> Throughout the process I . . . strategize[d] and manipulate[d] . . . not answering the telephone for fear of being trapped into a less-than-ideal interview early on, and trying to arrange interviews strategically . . . .[51]

The question is how widespread and, more importantly, how successful these efforts prove to be.

One difficulty in scheduling interviews strategically, so as to meet top-choice judges first, is that prior to interviewing with a number of judges, students may not know who their top choices are. (And, of

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51 1999 Student Survey #112.

course, the same goes for judges.) As one student wrote, "[T]he ability to research the federal judiciary in advance so that you know exactly for whom you would and would not accept an offer is impossible. What is the point of the interview on the students' side if it can't be used to further screen for [judge] quality?"[52]

But even given their limited information, our 2000 student survey results make clear that students are not able to arrange their interviews optimally so that an early offer comes from what they regard (based on the limited information they have) as their top-choice judge. As reported in Table 9, in only about one-third of cases was a student's first offer from what the student perceived to be his or her top-choice judge. Yet, as the table shows, 58 percent of students who received their first offer from a judge who was not their top choice nonetheless accepted that offer. Indeed, correlating these results with the earlier results about the timing of acceptance, 26 percent of these candidates accepted the offer from the non-top-choice judge immediately. (This last result is not shown on the table.) The results in Table 9 are even more striking since one might expect cognitive dissonance to push students toward the ex post belief that the offers they received or accepted were more desirable than they otherwise might have been thought to be.

52 1999 Student Survey #135.

**TABLE 9**
**DESIRABILITY OF AND RESPONSE TO A STUDENT'S FIRST OFFER (1999–2000)**

| Desirability of and response to first offer | % of responding students |
|---|---|
| First offer was first-choice position (of the 102 students who responded to this question): | |
| Yes | 34% |
| No | 66% |
| First offer was accepted: | |
| Of the 35 students for whom first offer was first-choice position: | |
| Yes | 100% |
| No | 0% |
| Of the 67 students for whom first offer was not first-choice position: | |
| Yes | 58% |
| No | 42% |

*Source*: 2000 Student Survey.

Results reported in Table 9 might, of course, suggest that students' first offers are the most desirable *of the offers they were going to get*, even if they are not the most desirable of all possible offers. But evidence from our 1999 student survey suggests that this is not the case. In 1999 we asked students to rank the judges with whom they received interviews from most to least preferred and then asked them to list the lowest judge from whom they would have accepted an offer if they had not yet heard back from more preferred judges. 96 percent of respondents would have accepted an offer from a judge in the lower half of their list rather than wait for their other scheduled interviews; 44 percent would have accepted an offer from their least preferred judge. The point is not that a clerkship with the least preferred judge would be an undesirable outcome in an absolute sense (if no other options were available), but that many students are apparently willing to forego any chance at the range of more attractive options to avoid losing the certain opportunity with the least preferred judge. Although the 1999 question, unlike the question from the 2000 survey, has a hypothetical element, it indicates strongly that students will accept offers from less preferred judges even when they are awaiting scheduled interviews with more preferred judges.

As with the practice of speedy responses to the first offer, the reasons for the likelihood of acceptance of the first offer are easy to understand. To begin, many students may fear that declining an offer

is an affront to the judge, as already noted. This fear may result among other things from pressure exerted by law professors, who are repeat players with institutional interests and who may feel that immediate acceptances from their school's students enhance the chances for students from that school the following year. Judge Becker, then-Judge Breyer, and then-Dean Calabresi bemoan "the 'conventional wisdom' propagated in many law schools that applicants are obliged to accept the first offer tendered," a state of affairs that the authors "find . . . inexplicable and indefensible."[53] But institutional interests may explain the puzzle; professors (or career services offices) may tell students they must or should accept immediately even though some judges do not require this because it serves the broader interests of the institution over the years.

A second critical factor is the strong student aversion to sacrificing a "bird in the hand" for uncertain prospects down the road. Many student comments, quoted in Table 10, suggest that students often accept less preferred positions because they do not know whether they will have other options later on. Apparently, accepting an early offer from a less preferred judge is preferred to waiting out the market. But obviously it may mean that students miss out on the chance to match with preferred judges who may be extremely interested in them.

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53 Becker, Breyer, and Calabresi, 104 Yale L J at 223 (cited in note 8).

## TABLE 10
### THE "BIRD IN THE HAND" RATIONALE FOR ACCEPTING AN EARLY CLERKSHIP OFFER

| Survey | Comment |
|---|---|
| 1999 Survey #46 | I was made an offer in late January before the majority of my judges even started interviewing. I chose to accept the offer with a judge who was not in the top 1/2 rather than take the chance on waiting for a more preferred judge to call. |
| 1999 Survey #120 | I was offered an early interview by one judge who, though I knew I would be happy clerking for, was not my top choice. I was led to believe he might offer a position at the interview. I had a difficult time deciding whether to go to the interview (and possibly foreclose other options) or cancel (and possibly lose the bird in the hand). I went. Got an offer. Accepted. |
| 1999 Survey #164 | [A]t the end I was in Union Station in DC, waiting to get a bus to Dulles, [Judge *A*'s] office had me on hold because they said they'd tell me yes/no by [a particular time], and I was missing calling back [Judge *B*], whose offer exploded at [that same time]. I ended up calling [Judge *B*] to ask for more time, but realized how rude that would be, so I accepted [Judge *B*] without knowing [Judge *A*'s] decision. And I missed my plane! |
| 1999 Survey #5 | [W]hile in [southern city] I had received an offer from a district court judge (with 24 hours to reply). I checked my messages at home and found I had been offered an interview with an appellate court judge (I had essentially given up on the appellate court market at this time). But I decided just to take the 'bird in the hand.' |
| 2000 Survey #246 | The day after my offer, I was very interested in the offer, but I also wanted to continue interviewing because I wanted more information to make [my] decision. However, my judge (the one I accepted with) indicated that he would continue to interview and might fill my slot. |
| 2000 Survey #247 | I got an offer from a judge who was not my first choice, at the end of an interview, and had to respond by the next morning. I had an interview with my first choice judge scheduled for the next day. I was risk averse and took the exploding offer, but still wonder if I did the right thing. |

*Source*: 1999 and 2000 Student Surveys.

*(iv) Fourth step: subsequent interviews are cancelled.* As a result of the speed with which judges and students pair off early on, both students and judges end up canceling large numbers of previously scheduled interviews. Two-thirds (66 percent) of the judges responding to our 2000 survey, and 79 percent of those responding to our 1999 survey, had at least one applicant cancel a scheduled interview, as shown in the bottom panel of Table 11. On average, each judge conducted approximately eight interviews and experienced approximately two cancellations in each year,[54] so approximately 20 percent of all scheduled interviews were cancelled by students (two cancellations for every ten scheduled interviews). These numbers fit nicely with the student surveys: as reported in Table 12, of the 127 students responding to our 2000 survey who had scheduled interviews, almost half (57) reported that they cancelled at least one interview, and a total of 161 of 695 scheduled interviews, or 23 percent, were cancelled by students.[55] Presumably judges also cancelled at least some interviews (or at least one would hope that they did), since, as reported in Table 16 below, a substantial number of judges had no clerkship positions left by the time of their last scheduled interview.

Of course, some cancellations of later interviews may be efficient, as when neither judge nor student was at the top of the other's list and preferred options materialize for both. But, as demonstrated above, at least from the student side, early offers often come from non-top-choice judges, and so applicants are missing the chance to consider what might be more preferred alternatives.

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54 These numbers are based on the figures reported in Table 11. The calculations assume the mean value for the ranges reported on the actual survey (for instance, 1.5 interviews for a judge who chose the "1 to 2" option); for the "more than 12" range for interviews conducted, the calculations assume a value of 14, and for the "more than 6" range for interviews cancelled, they assume a value of 8.

55 These numbers are based on the figures reported in Table 12. Twenty-eight students who reported the number of interviews they had scheduled did not report the number of interviews they cancelled. This is probably a consequence of our wording of the cancellation question, which said "How many interviews did you schedule and later cancel when you accepted a position?" It seems plausible that students who did not receive any offers did not respond to this question. Such students presumably did not cancel any interviews. The 23 percent figure in the text thus reflects the assumption that students who responded to the question about the number of interviews scheduled but not to the question about the number of cancellations did not cancel any scheduled interviews. The percent cancelled would be slightly greater under a different assumption.

**TABLE 11**
**INTERVIEWS AND STUDENT CANCELLATIONS AS REPORTED BY JUDGES**

| | % of responding judges (cumulative % in parentheses) | |
|---|---|---|
| | *1998–1999* | *1999–2000* |
| Number of interviews conducted: | | |
| 1 to 3 | 8% (8%) | 16% (16%) |
| 4 to 6 | 25% (33%) | 26% (42%) |
| 7 to 9 | 24% (57%) | 20% (62%) |
| 10 to 12 | 25% (82%) | 16% (78%) |
| More than 12 | 18% (100%) | 22% (100%) |
| | *Total number of responses*: 134 | *Total number of responses*: 105 |
| Number of cancellations by students: | | |
| 1 to 2 | 40% (40%) | 31% (31%) |
| 3 to 4 | 21% (61%) | 21% (52%) |
| 5 to 6 | 13% (74%) | 7% (59%) |
| More than 6 | 4% (79%)[a] | 7% (66%) |
| None | 21% (100%) | 34% (100%) |
| | *Total number of responses*: 137 | *Total number of responses*: 113 |

*Source*: 1999 and 2000 Judge Surveys.

[a] The cumulative percentage does not equal the sum of the previous cumulative percentage and the new percentage as a consequence of rounding.

## TABLE 12
### INTERVIEWS AND STUDENT-INITIATED CANCELLATIONS (1999–2000)

| | Number of responding students | % of responding students | Cumulative % | Number of interviews |
|---|---|---|---|---|
| Number of interviews scheduled: | | | | |
| 0 | 4 | 3% | 3% | 0 |
| 1 | 15 | 12% | 15% | 15 |
| 2 | 14 | 11% | 26% | 28 |
| 3 | 17 | 13% | 39% | 51 |
| 4 | 10 | 8% | 47% | 40 |
| 5 | 12 | 9% | 57%[a] | 60 |
| 6 | 13 | 10% | 67% | 78 |
| 7 | 14 | 11% | 78% | 98 |
| 8 | 7 | 6% | 83%[a] | 56 |
| 9 | 1 | 1% | 84% | 9 |
| 10 | 4 | 3% | 87% | 40 |
| 11 | 3 | 2% | 90%[a] | 33 |
| 12 | 3 | 2% | 92% | 36 |
| 13 | 4 | 3% | 95% | 52 |
| 14 | 1 | 1% | 96% | 14 |
| 15 | 3 | 2% | 98% | 45 |
| 20 | 2 | 2% | 100% | 40 |
| *Total* | 127 | | | 695 |
| Number of interviews cancelled: | | | | |
| 0 | 42 | 42% | 42% | 0 |
| 1 | 16 | 16% | 59%[a] | 16 |
| 2 | 14 | 14% | 73% | 28 |
| 3 | 13 | 13% | 86% | 39 |
| 4 | 6 | 6% | 92% | 24 |
| 5 | 4 | 4% | 96% | 20 |
| 6 | 1 | 1% | 97% | 6 |
| 7 | 1 | 1% | 98% | 7 |
| 10 | 1 | 1% | 99% | 10 |
| 11 | 1 | 1% | 100% | 11 |
| *Total* | 99 | | | 161 |

*Source*: 2000 Student Survey.

[a] The cumulative percentage does not equal the sum of the previous cumulative percentage and the new percentage as a consequence of rounding.

*(v) Corollary: students limit their application pools.* A natural consequence of the speed with which things resolve in the market for federal judicial law clerks is that students have an incentive not to apply to judges within that market in whom they are interested but not *that* interested. Our student survey in both 1999 and 2000 asked, "Did you limit the number of judges to whom you applied based on a concern that some of your less-preferred judges would offer you interviews or positions before you had heard back from your more-preferred judges?" More than half of the respondents (55 percent) answered "yes" to this question in 2000 (of a total of 128 responses to this question). In 1999 42 percent answered "yes" (of a total of 108 responses to this question).

It should be noted that the efficiency aspects of this feature of the clerkship market are less clear than the efficiency aspects of the features discussed above. Some desirable matches may not be made—as when a student does not apply to a given judge who would have hired the student, and for whom the student would have liked to clerk, and the student ends up with no clerkship at all—but at the same time, limited application pools save resources that would have been spent by judges, recommenders, and other parties on matches that might never have materialized.

*(vi) Another corollary: students opt out of the process entirely.* The nature of the law clerk hiring process may also lead some students not to apply at all. More than half (58 percent) of the students who said in response to our 2000 survey that they did not apply for federal appellate clerkships reported that their decision not to apply was influenced by either the nature or the timing of the market. (We discuss the timing of the market—the early date at which the market takes place—in more detail below.) We did not ask a similar quantitative question of students in 1999, but from that year we have anecdotal evidence, summarized in Table A7 in the Data Appendix, of a similar effect of the nature of the process on students' decisions to apply. Obviously, if students who choose not to apply are missing opportunities that they would (in a better world) want to pursue, and judges would be interested in some of these individuals, then the nature of the process of law clerk hiring is impeding the satisfaction of judges' and students' preferences.

*b) Early hiring.* The law clerk market may fail to maximize judges' and clerks' satisfaction not only as a result of the nature of the process (the focus of the previous discussion) but also as a result of the early time at which hiring occurs. As noted in Part I above, when hiring occurs early, judges have less information on which to base their decisions about which clerks would be most attractive to them. Likewise, students have less information about whether and where they

would like to clerk. Our survey results show both that the clerkship market has moved progressively earlier in time over the last three hiring seasons and that the early time at which the market moves—like the nature of the process itself—discourages some students from applying at all.

*(i) Evidence on timing in the 1998–1999 and 1999–2000 clerkship markets.* Our survey results show that the clerkship market moved relatively early in the second year of law school in 1998–1999 and earlier still in 1999–2000; these results thus provide a striking illustration of unraveling in progress.

Table 13 compiles the information reported by judges about the timing of the market in these two years. For 1998–1999, 28 percent of judges had begun interviewing and making offers by the end of January 1999, and 61 percent had reviewed applications by that time. These numbers are remarkable in light of the policy of the leading law schools during 1998–1999 that applications and recommendation letters from law school faculty were not to be sent prior to February 1. As the data dramatically show, this policy did not hold up. The data also reveal that a substantial number of judges moved earlier in 1998–1999 than they had in 1997–1998, as reported in the penultimate row of Table 13.

**TABLE 13**
**TIMING OF THE MARKET AS REPORTED BY JUDGES**

| | % of judges responding (cumulative % in parentheses) | | | | | |
|---|---|---|---|---|---|---|
| | *Date of Review of Applications* | | *Date of Interviews and Offers* | | | |
| | 1998–1999 | 1999–2000 | 1998–1999 | | 1999–2000 | |
| | | | Start Date[a] | Finish Date[b] | Start Date[a] | Finish Date[b] |
| Sept or earlier | 1% (1%) | 12% (12%) | 1% (1%) | 1% (1%) | 0% (0%) | 0% (0%) |
| Oct | 2% (3%) | 8% (20%) | 0% (1%) | 0% (1%) | 3% (3%) | 1% (1%) |
| Nov | 2% (5%) | 24% (44%) | 1% (2%) | 1% (2%) | 11% (14%) | 7% (8%) |
| Dec | 20% (25%) | 29% (72%)[c] | 8% (9%)[c] | 2% (3%)[c] | 29% (43%) | 22% (30%) |
| Jan | 35% (61%)[c] | 11% (84%)[c] | 18% (28%)[c] | 13% (16%) | 29% (71%)[c] | 34% (64%) |
| Feb | 25% (86%) | 3% (87%) | 42% (69%)[c] | 38% (54%) | 10% (81%) | 17% (81%) |
| Mar or later | 14% (100%) | 13% (100%) | 31% (100%) | 46% (100%) | 19% (100%) | 19% (100%) |
| Earlier than the prior year | 29% | 55% | 35% | | 57% | |
| Later than the prior year | 2% | 4% | 2% | | 3% | |
| *Total number of judges responding*: 127 for 1998–1999, 105 for 1999–2000 | | | | | | |

*Source*: 1999 and 2000 Judge Surveys.

[a] The start date is the date at which the judge started conducting interviews and making offers.

[b] The finish date is the date at which the judge finished conducting interviews and making offers.

[c] The cumulative percentage does not equal the sum of the previous cumulative percentage and the new percentage as a consequence of rounding.

Things happened even more quickly, and by a substantial margin, in 1999–2000. As shown in Table 13, 72 percent of responding judges indicated that they had reviewed applications by the end of Decem-

ber, compared to only 25 percent in 1998–1999. 43 percent indicated that they had started to interview candidates and make offers by the end of December, compared to only 9 percent in 1998–1999. By the end of January, 64 percent were completely done with interviews and offers, compared to only 16 percent in 1998–1999. Also as shown in Table 13, 55 percent of responding judges said that they reviewed applications earlier in 1999–2000 than they had in 1998–1999, and 57 percent said they conducted interviews and made offers earlier in 1999–2000, while almost no judges said they did either step later. By any measure, then, the clerkship market moved substantially earlier in 1999–2000 than in 1998–1999. Table A8 in the Data Appendix provides similar timing information broken down by circuit.

On the student side, 81 percent of the students who did one or more interviews in 1999–2000 reported having at least one interview before the end of December of 1999, as shown on Table 14. 57 percent of the students who received one or more offers during 1999–2000 reported having at least one offer before the end of December of 1999, as also shown on the table.

**TABLE 14**
**TIMING OF THE MARKET REPORTED BY STUDENTS (1999–2000)**

| Date | **Sent applications** | **First contact from a judge** (among students who received such contacts) | **First interview** (among students who did interviews) | **First offer** (among students who received offers) |
|---|---|---|---|---|
| | % of responding students (cumulative % in parentheses) | | | |
| Sept or earlier | 2% (2%) | 0% (0%) | 0% (0%) | 0% (0%) |
| Oct | 20% (22%) | 3% (3%) | 2% (2%) | 0% (0%) |
| Nov | 67% (89%) | 42% (45%) | 24% (26%) | 14% (14%) |
| Dec | 10% (99%) | 42% (87%) | 55% (81%) | 43% (57%) |
| Jan | 0% (99%) | 10% (97%) | 15% (96%) | 29% (86%) |
| Feb or later | 1% (100%) | 3% (100%) | 4% (100%) | 14% (100%) |
| | *Total number of responses:* 128 | *Total number of responses:* 124 | *Total number of responses:* 120 | *Total number of responses:* 102 |

*Source*: 2000 Student Survey.

For skeptics who tend toward the view that the current market for federal judicial law clerks must be operating efficiently, the data presented here raise serious questions. If 1999–2000 was efficient, then was 1998–1999, when hiring occurred substantially later, also efficient, or was it inefficient? More generally, given how much the timing in this market has bounced around over the years, it seems hard to assert that any current resting point is efficient.

The efficiency argument seems particularly strained for the 1999–2000 market, when the timing of the market clashed with both students' final exams and the law firm recruitment process. Tables A9-1 and A9-2 in the Data Appendix summarize student complaints about these clashes. It seems hard to believe that the 1999–2000 timing was optimal in any respect.

*(ii) Effects of early hiring on decisions to participate in the market.* As noted above, students may opt out of the law clerk market because of the nature of the hiring process; they may also opt out because of the early time at which hiring occurs. As noted above, we know that more than half (58 percent) of the students who said in re-

sponse to our 2000 survey that they did not apply for federal appellate clerkships reported that their decision not to apply was influenced by either the nature or the timing of the market. Also as noted above, for 1999 we have anecdotal evidence from students who did not apply for federal clerkships, and, as shown in Table A7 in the Data Appendix, for a number of these students the early time at which hiring occurs was a significant factor. Thus, the early time at which hiring occurs, like the nature of the process, may reduce the satisfaction of judges and students by dissuading some students from applying at all.

2. Disillusionment with the federal bench.

Moving from the efficiency criterion to the concern with disillusionment with the federal bench, our survey results provide strong support for the view that the rough-and-tumble nature of the clerk hiring process carries certain risks to the regard in which the federal judiciary is held, at least in the direct aftermath of the hiring process. A number of respondents to our judge and student surveys emphasized this sort of concern, as summarized by the often poignant comments quoted in Table 15.

## TABLE 15
## LAW CLERK HIRING AND REGARD FOR THE FEDERAL JUDICIARY

| Survey | Comment |
|---|---|
| 1999 Judge Survey #7 | [T]he current non-system makes applicants see judges behaving in ways which are unseemly, to put it mildly. That view of our behavior will inevitably shape what these people think of the judiciary. To the extent that many of these applicants will become leaders in the bar and in politics, we will as judges reap what we have sown. They will hold us in contempt and will not be wholly wrong. |
| 2000 Judge Survey #11 | The unseemly haste to hire law clerks is a disgrace to the federal bench. |
| 2000 Judge Survey #5 | The students think our hiring process is foolish. We are presently embarrassing ourselves with our lack of self-control. |
| 2000 Judge Survey #101 | The current approach reflects poorly on the judiciary. |
| 1999 Student Survey #111 | I can't overstate how disillusioned, disgusted and depressed the whole clerkship application system has left me .... [W]atching federal judges panic and lie [and] having interviews canceled after traveling to New York makes me clearly realize that this system needs reform. |
| 1999 Student Survey #154[a] | Some judges scrapped decorum and even bare civility. One federal district court judge asked a student to sneak into his office on a Sunday in January, through the service entrance. His court had agreed not to conduct early interviews, he explained, and he wanted to cheat in secret. |
| 2000 Student Survey #6 | Federal judges (many of them) suffer from immaturity, unprofessionalism, and egotism that I guess should be expected from life-tenured government employees who have no incentive to behave like adults. |
| 2000 Student Survey #43 | The gamesmanship that currently pervades the process is incredibly frustrating to students and ... corrosive of the dignity of the federal judiciary. |
| 1999 Student Survey #104 | I accepted an interview offer with a judge on the West Coast and flew out at considerable expense. At the end of the interview, it became evident that the judge had already made enough outstanding offers to fill his slots. I believe that he interviewed me as a 'backup.' |

*Source*: 1999 and 2000 Judge Surveys; 1999 and 2000 Student Surveys.

[a] This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

The comments in Table 15 are obviously anecdotal and should be viewed as such. At the same time, however, quantitative data from our judge surveys make clear that the underlying forms of judicial behavior noted in the table are far from isolated. The practice of interviewing candidates (at the candidates' expense) when no slots remain available is far less rare than we would have guessed prior to the surveys. We would have guessed that this occurred only very occasionally; indeed, one judge wrote in response to our inquiry about whether the judge had at least one slot left by the time of the last scheduled interview, "Yes, of course. What kind of a slug do you take me for?"[56]

The numbers, however, show a striking number of self-confessed "slugs." In 2000, 15 percent of responding judges had *no* slots available by the time of their last scheduled interview with a candidate, as shown in Table 16. Senior judges were more likely to have no slots left than active judges, as the table shows, but still, in both 1999 and 2000, almost one in ten active judges admitted to having no slots available by the time of their last scheduled interview. Some judges presumably cancel scheduled interviews once their slots are filled, but this may or may not spare the candidate the expense of a fruitless trip depending on the refundability of the candidate's airplane ticket.

**TABLE 16**
**JUDGES WHO HAD NO SLOTS LEFT BY THE TIME OF THEIR LAST SCHEDULED INTERVIEW**

| **Group of federal appellate judges** | **% of responding judges with no slots left by the time of their last scheduled interview** | |
|---|---|---|
| | *1998–1999* | *1999–2000* |
| All federal appellate judges | 11% | 15% |
| Active judges | 9% | 9% |
| Senior judges | 13% | 32% |
| | *Total number of responses*: 139 | *Total number of responses*: 110 |

*Source*: 1999 and 2000 Judge Surveys.

The lack of open slots by the end of the interview period is a natural tendency of a process under which the great majority of judges start making offers before completing their interviews. In both 1999 and 2000, approximately three-quarters of active judges responding to our surveys had made at least some offers before the completion of

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56 2000 Judge Survey #90.

interviews, as shown in Table 3 above. We do not mean to suggest that offering some positions before the end of interviewing is necessarily objectionable, but it does obviously mean that those interviewing later—who may be paying large sums to travel to the interview—are competing for fewer and fewer positions.

Students responding to our surveys expressed not only direct concerns about judges' conduct but also a general disenchantment (voiced in no uncertain terms) with the clerk hiring process. Tables 17-1 and 17-2 provide a sampling of some of the most striking comments. Of course, these responses may not represent a random slice of student opinion; presumably we were more likely to hear from students dissatisfied with the process than from those who were pleased with it. At the same time, it is critical to emphasize that, as the right-hand column of the tables reveals, the sources of the negative student comments appear generally to have been quite successful in the clerkship market. This is particularly clear for 1999, when we asked for detailed information about the judges from whom the student received offers. Our measure for 2000—the total number of offers the student received—is less informative, but it still seems noteworthy that none of the students quoted failed to receive at least one clerkship offer. Thus, this is not a group of disgruntled students who received no clerkship offers or (at least insofar as 1999 reveals) only offers from relatively unappealing judges.

**TABLE 17-1**
**STUDENT REACTIONS TO THE LAW CLERK MARKET (1998–1999)**

| Survey | Comment | Student's Outcome |
|---|---|---|
| Survey #184 | It's terrible. Just about anything, including malicious lies, forcible running with scissors, and active misuse of electric cords, would be better. | No offer. |
| Survey #119 | Craziness. | Two offers from highly prestigious court of appeals judges. |
| Survey #172 | Insane. | Three offers from highly prestigious court of appeals judges. |
| Survey #178 | Chaotic. | Three offers from top district court judges in Washington D.C. and New York City. |
| Survey #168 | Brutal. | Offer from a highly prestigious court of appeals judge. |
| Survey #123 | A total mess. | Offers from three prestigious court of appeals and district court judges. |
| Survey #121 | [A] complete mess. | Offers from four prestigious Second Circuit judges. |

*Source*: 1999 Student Survey.

**TABLE 17-2**
**STUDENT REACTIONS TO THE LAW CLERK MARKET (1999–2000)**

| Survey | Comment | Student's Outcome |
|---|---|---|
| Survey #26 | You will have to arrest me before I will again set foot in [specified courthouse]. I would not wish this process on my worst enemy. | One offer. |
| Survey #9 | One of the most arbitrary and ill-designed processes I've ever come across. | One offer. |
| Survey #20 | A crap shoot. | One offer. |
| Survey #21 | Horrible. | Two offers. |
| Survey #25 | Chaos. | Two offers. |
| Survey #28 | Absolute hell. | One offer. |
| Survey #32 | Crazy. | Two offers. |
| Survey #40 | Disorganized and chaotic. | Two offers. |
| Survey #200 | A zoo. | Two offers. |
| Survey #234 | A mess. | One offer. |
| Survey #240 | The clerkship hiring process is a disgrace. It is everything that we are taught at law school to dislike: inefficient, arbitrary and capricious and designed to benefit those with connections and inside information. | One offer. |
| Survey #245 | Deeply unfair. | One offer. |
| Survey #246 | An extremely unpleasant process. | One offer. |
| Survey #247 | Terrible. | Three offers. |
| Survey #252 | Totally outrageous, . . . stressful [and] chaotic. | Two offers. |

**TABLE 17-2**
**STUDENT REACTIONS TO THE LAW CLERK MARKET (1999–2000) (CONTINUED)**

| Survey | Comment | Student's Outcome |
|---|---|---|
| Survey #255 | Clerkship hiring is like flying through the air without a net, you never know where you'll land, and how hurt you'll be in the process. | One offer. |

*Source*: 2000 Student Survey.

Almost as interesting as some of the quotations in Tables 17-1 and 17-2 was the following remark from a student who had a more positive view of the clerkship hiring process: "I think it benefits law students at privileged schools to be subjected to the same random, difficult job search process that people in other fields have to [undergo]."[57] Perhaps that is the best argument to be made for the current process, but it does not suggest that this process is one that is likely to cast the federal judiciary in a particularly favorable light.

3. Perceived fairness.

As noted in Part I above, participants may regard the law clerk market as unfair to the extent that the frenzied manner and early timing of hiring lead the market to rely on various forms of personal well-connectedness in matching applicants and judges. Students with relationships to previous high achievers in the legal world and elsewhere may be advantaged in the clerkship competition as a result of the limited information available to judges. Our survey results provide evidence both that personal well-connectedness does matter in at least some cases and that some students (and judges) regard this as unfair. Note that our claim is not that such reliance *is* "unfair" (however defined) but simply that some participants in this market regard it as such and experience disutility as a result. Also, it may be that any process would be regarded as unfair by some, but the fairness objections we describe below appear to be shared by a larger group than would probably be the case under a different system.

*a) Peer recommendations.* An intriguing feature of the market for federal judicial law clerks is the role played by other students' and recent graduates' recommendations. In some instances clerks or judges solicit the opinions of applicants' current classmates, as reflected in the

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57 2000 Student Survey #264.

survey comments reported in Table A10 in the Data Appendix. These comments show both that peer references from current classmates matter in this market and that at least some students regard this as unfair.

At least as important as recommendations from current classmates are recommendations from recent law school graduates who are currently clerking. Our 1999 and 2000 judge surveys show that two-thirds of responding judges (67 percent in 1999 and 66 percent in 2000) use current clerks to screen applications. Table 18 shows that, at least anecdotally, current clerks may rely in part on their personal connections in performing the screening function. Interestingly, at least two of the students quoted in the table (the third and eleventh quotations) seemed to regard the effect of the personal connection as unfair even though they were presumably helped by it.

**TABLE 18**
**THE ROLE OF CONNECTIONS WITH CURRENT LAW CLERKS**

| Survey | Comment |
|---|---|
| 1999 Survey #109 | With [a particular judge] one of his clerks I knew from law school. The judge made it clear that this clerk was rooting for me. |
| 1999 Survey #160 | I have a good friend clerking for [a particular judge] who thought we would be a good fit—I'm sure her influence was helpful. |
| 1999 Survey #163 | I know the current clerks of [two particular judges with whom the candidate received interviews]. Both have assured me that I received interviews on my merits .... That's what they say, but I can't help but feel like perhaps they had some influence. |
| 1999 Survey #134 | A current clerk [of a judge from whom the student received an offer] is an acquaintance of mine and helped get me an interview. |
| 1999 Survey #115 | Current clerks in [two particular judges' chambers, who were graduates of the candidate's law school, played an important role]. I am pretty sure they had good things to say about me to their respective judges. |
| 1999 Survey #49 | A [clerk for a particular judge] helped me get an interview. |
| 1999 Survey #55 | [Knowing a current clerk for a particular judge] probably expedited my ability to get the interview [with that judge]. |
| 2000 Survey #5 | [T]wo current clerks with whom I had worked either called me for an interview with their judge or recommended me to another judge in the same circuit. |
| 2000 Survey #12 | I knew the current clerk of a judge who interviewed me, I'm sure that clerk played a role in my getting the interview. |
| 2000 Survey #20 | I was acquainted with one of the clerks currently working for [a judge from whom this candidate received a clerkship offer]. |
| 2000 Survey #32 | I think there would have been no chance of me interviewing with [a particular judge] if a friend of mine hadn't been one of her clerks. That made it all the more satisfying when I [later] got an interview with [a different judge] whom I know I have no contact with. |

**TABLE 18**
**THE ROLE OF CONNECTIONS WITH CURRENT LAW CLERKS (CONTINUED)**

| Survey | Comment |
|---|---|
| 2000 Survey #251 | The two appellate and six SDNY [Southern District of New York] interviews were all with judges with whom I had some connection through their clerks. |
| 2000 Survey #254 | I know, and was not hurt by, a current clerk. |
| 2000 Survey #10 | One current clerk for [a particular judge] used to be an acquaintance at school. I think he helped get me an interview. |

*Source*: 1999 and 2000 Student Surveys.

*b) Faculty "clerkship brokers."* Clearly law professors play an important role in the clerkship process; their recommendations of students are a significant component in judges' evaluation of applicants, as shown in Table A11 in the Data Appendix. No one seems to regard that in itself as unfair. But sometimes the role of the faculty member goes beyond the familiar role of recommender. In some instances professors play the role of "interview broker" or "offer broker" in the clerkship market or even choose the clerks themselves. This is reflected in the comments from our student and judge surveys reported in Table A12 in the Data Appendix; it is also reflected more quantitatively in responses to our judge surveys, which showed that approximately 27 percent of judges in 1999 and 19 percent in 2000 relied on professors to screen applications.

At least some students and judges seem to regard the sort of "faculty feeding" described in our student and judge surveys as unfair:

> I am and was completely repulsed by the "this professor secretly handpicks and recommends a favorite student to a particular judge" routine.[58]

> [T]he biggest problem . . . for students [is] the old boy's network. If you are not the darling of an aged white male professor, who may be severely uncomfortable working with talented women or people of color, you should kiss your chances of a clerkship goodbye and not bother applying. In my [particular school] class, approximately 80% of the students who received circuit court clerkships "applied" as [a] formality only, their clerkships were delivered to them by 2 or 3 faculty members.[59]

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58 2000 Student Survey #16.

59 2000 Student Survey #251.

> The "special deals" between judges and professors violate the spirit if not the letter of attempts to hire in a more orderly way.[60]

*c) Other forms of well-connectedness.* Social connections may also aid some applicants, and again this may be regarded as unfair. Table 19 lists student comments suggesting the importance of various forms of social well-connectedness, including connections with friends of a judge or a judge's former clerks. Some participants in the market are likely to view the role of such connections as unfair; as one student lamented, "I feel that I was not a party to the network."[61]

**TABLE 19**
**THE ROLE OF VARIOUS TYPES OF SOCIAL CONNECTIONS**

| Survey | Comment |
|---|---|
| 1999 Survey #177 | A good family friend called [a particular judge], and I received a call from the judge about thirty minutes thereafter. [The student ultimately received an offer from this judge.] |
| 1999 Survey #120 | [A] close friend of [a particular judge] made a call on my behalf. |
| 1999 Survey #129 | A former [clerk for a particular judge] called [that judge] to recommend me. I think I was [that judge's] top . . . choice based on that clerk's recommendation. |
| 1999 Survey #130 | A former clerk of [a particular judge] is a good friend of mine, and played a big role. |
| 1999 Survey #189 | With [a particular judge] a family connection helped. |
| 2000 Survey #7 | A former clerk who knew me well called her judge for me. |
| 2000 Survey #11 | Got an interview (and the offer) in [specified court] because old college friend was ex clerk and talked me up to judge. |
| 2000 Survey #12 | One of my best friend's [sic] father is a law professor and he put in a call for me to a judge he knows. |
| 2000 Survey #59 | A friend of my mother's put in a good word with a judge they knew. |
| 2000 Survey #234 | The clerkship I eventually accepted was offered after a professor at another law school (who I know well) made a phone call to the judge. |

*Source*: 1999 and 2000 Student Surveys.

60 1999 Judge Survey #26.
61 2000 Student Survey #24.

In short, the law clerk market appears to rely heavily on various forms of personal well-connectedness, and at least some participants seem to regard this as unfair.

## III. THE EXPERIENCE OF OTHER MARKETS

The market for federal judicial law clerks is far from alone in its difficulty in establishing the timing of transactions, with the variety of efficiency and other problems that result. Table 20 below lists several dozen markets and submarkets that have experienced the unraveling of transaction dates. Table 20 concentrates primarily on markets that, like the law clerk market, are entry-level professional labor markets. Timing problems are particularly easy to identify in these markets because generally employment cannot begin until the professional has completed his or her education, yet arrangements may be made far in advance.

Timing problems are not restricted to labor markets, however. The list in Table 20 includes the market for postseason college football bowls; again timing problems are easy to identify here, since postseason bowl games cannot be played until the end of the regular season. Another good example of timing problems in a nonlabor context is fraternity and sorority rush, where recruitment had at one point moved back to the pre-college years even though the activities of the organization in question did not commence until college.[62] Yet another example is early admission to college; nearly three-quarters of high school students who go on to attend elite colleges now apply for early admission to one or more colleges in response to incentives offered by colleges.[63]

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[62] See Roth and Xing, 84 Am Econ Rev at 1019 (cited in note 3). Indeed, here the unraveling of selection dates has even entered the language in the form of the term "rush." See Susan Mongell and Alvin E. Roth, *Sorority Rush as a Two-Sided Matching Mechanism*, 81 Am Econ Rev 441, 441 (1991).

[63] See Christopher Avery, Andrew Fairbanks, and Richard Zeckhauser, *The Early Admissions Game: The Perspective of Participants* (work in progress) (on file with authors).

**TABLE 20**
**A SELECTION OF MARKETS WITH TIMING PROBLEMS**

| Market | Organization | Stage[a] |
|---|---|---|
| *Entry-Level Medical Labor Market:* | | |
| American first-year postgraduate (PGY1) positions | National Resident Matching Program (NRMP) | 3 |
| Canadian first-year positions | Canadian Intern and Resident Matching Service | 3 |
| U.K. regional markets for preregistration positions: | Regional health authorities | |
| Edinburgh | | 3 |
| Cardiff | | 3 |
| Birmingham | | 4, 1 |
| Newcastle | | 4, 1 |
| Sheffield | | 3 or 4, 1 |
| Cambridge | | 3 |
| London Hospital | | 3 |
| American specialty residencies: | | |
| Neurosurgery | Neurological Surgery Matching Program | 4 |
| Ophthalmology | Ophthalmology Matching Program | 3 |
| Otolaryngology | Otolaryngology Matching Program | 3 |
| Neurology | Neurology Matching Program | 3 |
| Urology | AUA Residency Matching Program | 3 |
| Other specialties[b] | NRMP | 3 and 4 |
| Advanced specialty positions: | | |
| Twelve (primarily surgical) specialties[c] | Specialties Matching Services | 3 |
| Medical | Medical Specialties Matching Program | 3 |
| Subspecialties: | | |
| Four ophthalmology subspecialties | Ophthalmology Fellowship Match | 3 |
| Plastic surgery | Plastic Surgery Matching Program | 3 |

[a] The "stages" are explained in the text just below.
[b] Anesthesiology, emergency medicine, orthopedics, physical medicine, psychiatry, and diagnostic radiology.
[c] Colon/rectal surgery, dermatology, emergency medicine, foot/ankle surgery, hand surgery, ophthalmic plastic and reconstructive surgery, pediatric emergency medicine, pediatric orthopedics, pediatric surgery, reproductive endocrinology, sports medicine, and vascular surgery.

**TABLE 20**
**A SELECTION OF MARKETS WITH TIMING PROBLEMS**
**(CONTINUED)**

| Market | Organization | Stage |
|---|---|---|
| *Entry-Level Legal Labor Markets*: | | |
| Federal court clerkships | Judicial Conferences | 2, then 1 |
| Canadian articling positions: | Articling Student Matching Program | |
| Toronto | | 3 and 4 |
| Vancouver | | 3 or 4, then 1 |
| Alberta (Calgary) | | 3 |
| *Entry-Level Business School Markets*: | | |
| New MBA's | | 1[d] |
| New marketing professors | | 1 |
| *Other Entry-Level Labor Markets*: | | |
| Japanese university graduates | Ministry of Labor; Nikkeiren | 2 |
| Clinical psychology internships | Association of Psychology Post-doctoral & Internship Centers[e] | 2, then 3 |
| Dental residencies (three specialties and other general programs) | Postdoctoral Dental Matching Program | 3 |
| Optometry residencies | Optometric Residency Matching Services | 1 and 3 |
| *Postseason College Football Bowls* | National Collegiate Athletic Association ("NCAA") | 1, then 3 |
| *Other Two-Sided Matching*: | | |
| Fraternity rush | | 1 |
| Sorority rush | National Panhellenic Conference | 3 |

*Source*: Roth and Xing, 84 Am Econ Rev at 993 (cited in note 3).

[d] Occasionally.

[e] The name of this organization used to be "Association of Psychology Internship Centers."

In many of the markets in Table 20, considerable effort has been expended to halt, reverse, or otherwise control the timing of transactions. The table lists for many of the markets the organization that has

been entrusted with this task. Many of these organizations were created expressly for the purpose of controlling the unraveling of transaction times. In many instances these organizations can bring to bear considerable compulsory power. But frequently a solution to the timing problem has nonetheless proved elusive. The difficulties encountered by these other markets may therefore illuminate the problems in the market for federal judicial law clerks and the prospects and potential pitfalls in the road to reform of this market.

### A. A Framework: Four Stages of Unraveling Markets

To make it easy to describe the common phenomena found in a diverse set of markets, Table 20 loosely categorizes each market it describes as most recently being in one of four "stages," as follows.[64]

Markets that are in the process of unraveling—in which appointment dates are getting earlier from year to year, or in which they have moved to the earliest feasible date—are stage one markets. Here is a generic description of stage one:

> *Stage 1* begins when . . . the relatively few transactions [in the market] are made without overt timing problems. By the middle of stage 1 . . . some appointments are being made rather early, with some participants finding that they don't have as wide a range of choices as they would like: students have to decide whether to accept early job offers or take a chance and wait for better jobs, and some employers find that not all of the students they are interested in are available by the time they get around to making offers. The trade journals start to be full of exhortations urging employers to wait until the traditional time to make offers, or at least not to make them any earlier next year than this year. Towards the end of stage 1, the rate of unraveling accelerates, until sometimes quite suddenly offers are being made so early that there are serious difficulties distinguishing among the candidates. There is no uniform time for offers to be made nor is there a customary duration for them to be left open, so participants find themselves facing unnaturally thin markets, and on both sides of the market a variety of strategic behaviors emerge, many of which are regarded as unethical practices. Various organizations concerned with the market may have proposed guidelines intended to regulate it, without notable success. As stage 1 ends, influential market participants are engaged in a vigorous debate about what can and should be done.[65]

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64 This section draws from Roth and Xing, 84 Am Econ Rev at 996–98 (cited in note 3).

65 Id at 996.

Although this was not written as a description of the law clerk market, it fits it to a "T."

Stage two markets are those that have instituted regulations specifying the time before which offers and sometimes other contacts cannot be made, and sometimes how long offers must remain open. Stage two markets are still decentralized, with employers contacting potential employees directly to make offers. During each of the six attempted reforms of the law clerk market, this market was in stage two. For instance, the most recent attempted reform specified February 1 as the date before which contacts could not be made and March 1 as the date before which (in effect) offers could not be made.[66]

Stage three markets are those that have instituted centralized market clearing procedures, which not only serve to determine the time at which transactions take place but also organize the transactions (the order in which offers are made and the point at which transactions are finalized). The most common form of stage three organization has potential employers and employees contacting each other (via applications, interviews, etc.) in a decentralized way, after which each employer submits a rank ordering of applicants to a central clearinghouse, to which each applicant also submits a rank ordering of positions.[67] The clearinghouse then uses these preference lists, in some pre-specified way (now often formalized in a computer program), to produce a match, and employers and employees are informed of the results of the match.[68] Perhaps the largest and best known of the centralized markets is the one by which new medical school graduates are matched to first-year residencies.[69] But, as Table 20 makes clear, lawyers too participate in stage three markets; "articling" positions required before being called to the bar in Canada are arranged in this way in several major cities.

Stage four markets are those with centralized mechanisms, but in which there has been at least some unraveling prior to the centralized market, as participants jockey for advantage in the centralized procedure.

> [T]he unraveling has often taken the form of recruiting students for summer internships (or in the case of some medical specialties for 'audition electives'), which amount to extensive interviewing opportunities in which the student spends a period of

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66 Becker, Breyer, and Calabresi, 104 Yale L J at 209–15 (cited in note 8), describe the six attempted reforms. As discussed in Part IV.B.1.a below, the March 1 date specified by the most recent reform technically applied to interviews, but most, although not all, judges are reluctant to hire without an interview.

67 Roth and Xing, 84 Am Econ Rev at 997 (cited in note 3).

68 Id.

69 See Roth and Peranson, 89 Am Econ Rev at 748 (cited in note 9).

> weeks or even months at the firm. Because of the length of time involved, students can interview in this way at only a very small number of firms . . . and firms can interview only a few students in this way. Because the percentage of new employees hired by each firm who were previously summer interns there sometimes becomes quite high, these internships can become a way of moving the recruiting process before the centralized matching mechanism.[70]

These four stages provide a framework within which to discuss the particular markets from Table 20 in more detail. In the next section we offer some vignettes from those other markets in the hope that they will illuminate the problems experienced in the market for federal judicial law clerks.

## B. Vignettes

### 1. Medical residencies.

A good place to begin is with the history of the market for new American medical school graduates, both because that is the first of these "unraveling" markets to have been studied as such by economists[71] and because of its role (discussed more fully in Parts IV.C and IV.D below) in the debate over how to reform the clerkship market.[72] But it is not the successful experience of the centralized stage three medical market that we wish to discuss here but, instead, the period from 1945 to 1951, when the medical market was organized as a stage two market.

Prior to 1945 there had been a severe unraveling of appointment dates, so that medical students were being selected for post-graduation employment when they still had two full years remaining of medical school (much like today's market for federal judicial law clerks).[73] In 1945 the medical schools, working in conjunction with the residency programs, successfully implemented an embargo on letters of reference until a specified date, and this proved effective.[74] The date

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70 Roth and Xing, 84 Am Econ Rev at 997 (cited in note 3).

71 See Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J Pol Econ 991 (1984).

72 See Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 Georgetown L J 1749, 1753–97 (1995); Kozinski, 100 Yale L J at 1721–24 (cited in note 1); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 Cal L Rev 765, 791–98 (1993); Oberdorfer and Levy, 101 Yale L J at 1098–1108 (cited in note 41); Wald, 89 Mich L Rev at 160–63 (cited in note 2). Several of these authors have cited the economic investigation into the medical market in support of their (opposing) positions on reform of the clerkship market. See Kozinski, 100 Yale L J at 1721 n 29; Oberdorfer and Levy, 101 Yale L J at 1100–01 n 15, 1103 n 27.

73 Roth, 92 J Pol Econ at 994 (cited in note 71).

74 Id.

of appointment was successfully moved to one year before employment would begin, and in subsequent years the dates at which letters were released, and appointments made, were moved into the last year of medical school, nearer to the time of appointment.[75]

But the problems experienced by this market did not end when the appointment date was controlled (a stage-two-type solution). There followed a period in which the market was extremely disorderly, with students being called upon to make increasingly prompt decisions whether to accept offers. In 1945 offers were supposed to remain open for ten days.[76] Each subsequent year that interval was shortened, until by 1949 a grace period of twelve hours had been rejected as too long, and exploding offers were explicitly allowed.[77] What had happened was that hospitals found that if an offer was rejected very near the deadline, it was often too late for them to reach their next most preferred candidates before they had accepted other offers.[78] Even when there was a long deadline, much of this action was compressed into the last moments, since a student who had been offered a position at, say, his or her third choice hospital would be inclined to wait as long as possible before accepting, in the hope of eventually being offered a preferable position.[79]

A central clearinghouse was proposed and adopted only when these attempts to organize a stage two market had been exhausted.[80] With modifications, this kind of central clearinghouse has been used now in the medical residency market for almost half a century. The design of the current medical clearinghouse was directed by one of the authors of this work,[81] and its details are discussed more fully in Parts IV.C and IV.D below.

2. Postseason college bowls.

The American medical market is large and impersonal, and one important feature of this market, both before and after the move to a centralized clearinghouse, is that informal understandings between participants are not always honored. But in smaller markets, in which participants can expect to encounter each other again at later points in time, promises can often be relied on. Paradoxically (since one would

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75 Id.

76 Id at 994–95.

77 See id at 995 (describing the decision of the Association of American Medical Colleges to permit offers at 12:01 a.m. on a specified date with no required waiting period for responses).

78 Id at 994.

79 Id.

80 See id at 995–96 (describing the adoption of the matching system for the 1951–1952 market for medical residents).

81 See Roth and Peranson, 89 Am Econ Rev at 748 (cited in note 9).

ordinarily think that a small market would make an agreement on a fixed starting date for transactions easier to sustain), the small size can further increase the difficulty of achieving a stage two solution.

The experience of postseason college football bowls is illustrative. For many years the National Collegiate Athletic Association ("NCAA") attempted to control the date at which bowl agreements were signed by specifying a date (commonly called "Pick-Em Day") before which such agreements were forbidden.[82] The idea was to delay selection until sufficiently late in the regular season that teams with the best regular-season records would be likely to be matched against one another in the bowls.[83] However, despite the considerable penalties the NCAA can levy on teams and bowls, the fact that informal agreements could be relied upon allowed teams and bowls to make early agreements and avoid penalties.[84]

During the 1990–1991 football season there were highly publicized informal agreements, four weeks before the end of the regular season (and two weeks before Pick-Em Day), which sent Notre Dame to the Orange Bowl, Miami to the Cotton Bowl, and Virginia to the Sugar Bowl.[85] At that time (with four games left to play) Notre Dame, Miami, and Virginia were ranked by the sportswriters' poll as the number one, three, and eight teams in the nation.[86] But, following some losses before the bowl games were actually played, Notre Dame had dropped from number one to number five, and Virginia had dropped out of the top twenty altogether.[87] Because of the significant penalties associated with breaking NCAA rules, there are no public accounts of the details of these informal agreements.[88] However, "in confidential discussions with participants in this market, great confidence was expressed in the reliability of such agreements, once made."[89]

The NCAA gave up trying to enforce a date for bowl agreements following the embarrassing experience in the 1990–1991 season.[90] Since then bowl selection has become more centrally organized (a stage three model), based on agreements between consortia of football conferences and independent teams and consortia of bowls.[91] Thus,

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82 Roth and Xing, 84 Am Econ Rev at 1009 (cited in note 3).
83 Id at 1008–09.
84 Id at 1009–12.
85 Id at 1009.
86 Id at 1009–10.
87 Id at 1012.
88 Id at 1012 n 22.
89 Id.
90 Id at 1012.
91 See id at 1013.

as with the medical market, the attempt at a stage two solution proved infeasible, and a more centralized mechanism was adopted.

3. Clinical psychology positions.

One of the longest-running stage two markets was the American market for pre- and post-doctoral internships for clinical psychologists, which operated as a stage two market from the 1970s through the 1997–1998 academic year.[92] In this market, transactions were all to be made by telephone on "Selection Day" (akin to Pick-Em Day[93]), a specified date of each year.[94] The rules required that no offers be made before the opening time of the market (9:00 a.m. Central Standard Time in the early 1990s), and that all offers made during the course of the market and not yet rejected remain open until the closing time (4:00 p.m. Central Standard Time in the early 1990s).[95] Thus, "both early offers and 'exploding offers' (which require a decision before the end of the market) [we]re not allowed."[96]

This market survived for roughly twenty-five years despite a certain level of noncompliance, with somewhere between 10 percent and 25 percent of students reporting forbidden contacts from employers before the start of Selection Day and with reports also of informal pressure to signal in advance that if offered a job the candidate would accept it.[97] Various rules were formulated to discourage such forms of behavior, but these too were difficult to enforce.[98] Both the early contacts and the solicitation of promises seemed to be related to the fact that employers had good reason to try to avoid making offers that might be rejected late in the day on Selection Day. The reason is that, at 4:00 p.m., students who had offers in hand would accept them before they expired, so that a firm that had an offer rejected just before then might find that many of its more preferred alternate candidates had already accepted positions before they could be contacted. Observations of this market and interviews with participants suggest that, in deciding to whom to make offers, employers were substantially influenced by which students had indicated in advance that they would accept, and that, knowing this, students very often made such an indi-

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92 See Roth and Xing, 105 J Pol Econ at 285 (cited in note 20); Jamie Chamberlin, *Would-be Interns Hopeful about 'Matchmaker' Selection System: New System Could Eliminate Pitfalls of the Old Process*, 29 APA Monitor (Oct 1998), available online at <http://www.apa.org/monitor/oct98/intern.html> (visited Apr 20, 2001).

93 See text accompanying note 82.

94 Roth and Xing, 105 J Pol Econ at 285 (cited in note 20).

95 Id.

96 Id.

97 See Roth and Xing, 84 Am Econ Rev at 1017 (cited in note 3).

98 Id.

cation to some employer.[99] Early contacts and promises had much less force in the market for medical residencies prior to the move to a stage three solution, despite the similar congestion problems that existed, because (among other things) the size of the market means that a student who breaks an informal promise in the medical market may never have to deal again with the residency director who elicited it. In the clinical psychology market, by contrast, promises are reliable, since, as one program director said to one of us (Roth), "You see these people again."[100]

As a result of these problems, the clinical psychology market converted recently to a centralized clearinghouse, modeled on the medical market but adapted to the special features of the clinical psychology market. This centralized market ran for the first time in academic year 1998–1999.[101] So, once again, the market moved from stage two (which proved unsuccessful) to stage three.

4. Japanese university graduates.

Yet another example of a stage two market is the market for graduates of elite Japanese universities.[102] The unraveling in this market is so persistent and widespread that it has a popular name, *aotagai*, which translates as "harvesting rice while it is still green."[103]

Although hiring before specified dates is formally prohibited, hiring well in advance of graduation nevertheless persists through informal but effective guarantees of employment known as *naitei*.[104] These informal arrangements are similar to the understandings that brought down the stage two approaches in the college football and clinical psychology markets.

After a company has offered *naitei* to a particular candidate, the informal agreement is enforced through an interesting mechanism. Companies that offer *naitei* to students long before the beginning of employment try to prevent them, via physical restraint, from interviewing with other companies or government ministries.[105] For example, a company might invite all of the students to whom it had offered *naitei* to come to the company on the day the Finance Ministry was offering its civil service exam, with the understanding that the guarantee

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99 See Roth and Xing, 105 J Pol Econ at 289–90 (cited in note 20) (describing a 1993 selection day where the clinical psychology program directors extended offers to less preferred candidates who had given oral assurances that they would accept the offers immediately).

100 Id at 289 n 6.

101 See Chamberlin, 29 APA Monitor (cited in note 92).

102 Roth and Xing, 84 Am Econ Rev at 1015–16 (cited in note 3).

103 Id at 1015.

104 Id.

105 See id at 1016 & n 35.

of employment would be withdrawn from any student who failed to show up.[106]

*Naitei*, then, is a very effective means of making arrangements prior to the official date allowed in this stage two market. Despite the effectiveness of *naitei*, this market has continued to be organized (officially) as a stage two market, although in its practical effects it is probably more akin to a stage one market as a result of the role of *naitei*.

5. Canadian articling positions.

Canadian law graduates take an "articling" position following graduation and before being called to the bar.[107] The various regional markets for articling slots have been subject to unraveling, just as has the American market for federal judicial law clerks.[108] In response to this problem, two of the articling markets, in Toronto, Ontario, and in Alberta (primarily in Calgary), are now organized as stage three markets employing an algorithm developed in part by one of the present authors initially for the medical match.[109] As described above, stage three markets are ones in which matching of applicants to positions occurs through a centralized clearinghouse. Participation in the articling clearinghouses is by a subset of the firms in each regional market; some firms in each market do not participate.[110]

A centralized matching system solves one of the fundamental problems with a stage two solution, which is that congestion may occur on the start date. (Recall that this was the reason for the move to a stage three solution in the market for medical residency positions.) But the problem of implied or informal agreements in circumvention of the centralized clearinghouse remains. "Offers" and "acceptances" may be communicated outside the match with one side telling the other, "I'll rank you first in the match if you rank me first." This effectively moves the match date earlier, even if there is 100 percent pro forma participation in the centralized process. Applicants and firms will simply submit forms requesting to be matched with the parties with whom they had already agreed months in advance. This is by no means an academic problem; in some failed matches, up to 80 percent of the

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106 Id.

107 See id at 1024.

108 Id.

109 See Roth and Peranson, 89 Am Econ Rev at 748 (cited in note 9) (medical match algorithm).

110 See, for example, The Law Society of Upper Canada, *Procedures Governing the Recruitment of Articling Students for the 2001–2002 Articling Term* A.6, available online at <http://www.lsuc.on.ca/services/services_articlingproc2001_en.shtml> (visited Jan 18, 2001).

matching forms submitted to the centralized mechanism list only one partner, making clear that everything has been settled in advance.[111]

The stage three market for articling positions in Canada has taken a number of interesting steps to address the problem of informal agreements. In the Toronto match there are detailed regulations governing the nature of permissible communications between candidates and firms.[112] The Law Society of Upper Canada regulations seek to control the communication between firms and students both before and after interviews occur. Recognizing that, in light of the incomplete coverage of the centralized match and the fact that offers from nonparticipating firms may need to be acted upon before the match date, it is impossible to eliminate completely the discussion of rank orderings among participants—but wishing to prevent students being pressured into "deals" that would subvert the intention of the match—the regulations attempt to define and limit what kinds of communication are allowed when firms and students discuss the upcoming match. The regulations specify that firms may provide ranking information to students in advance of the match, but only within a specified time period. As the regulations provide:

> A.8. Subject to the exception noted below regarding summer students, no communication of ranking intentions shall take place prior to 8:00 a.m. on Monday, August 14, 2000.
>
> Exception: Firms in the matching program may communicate ranking intentions to summer students employed with their firm in the summer months of 2000 prior to Monday, August 14, 2000.[113]

The regulations further specify that students may, but cannot be required or pressured to, provide ranking information to firms:

> A.9. Firms shall not request from a student, explicitly or implicitly, information on intentions as to where the student will rank the firm.
>
> Commentary: Voluntary communication of ranking intentions by firms made in accordance with procedure A.8 will be permitted, provided the manner of communication does not impose pressure on students to reciprocate with communication of their own ranking intentions. For example, it is improper for a firm to say to a student "we will rank you within the firm's complement of stu-

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111 See Roth and Xing, 84 Am Econ Rev at 1000 (cited in note 3).

112 See The Law Society of Upper Canada, *Procedures Governing the Recruitment of Articling Students* (cited in note 110).

113 Id at A.8 (emphasis omitted).

> dents in the match (or first, etc.) if you rank us, or tell us, or commit to us, that you will rank us first."
>
> . . .
>
> A.11. Firms communicating ranking intentions to students . . . are strongly encouraged to communicate their ranking intentions using the terminology set out in the Society's "Guidelines for Firms Participating in the Matching Program re: Communication of Ranking Intentions to Articling Candidates."[114]

A major source of the pressure to communicate outside the match in the articling market is the fact that some students have applied both to firms in the match and firms not in the match. Since many more students participate in the match than there are positions offered in the match, the intention of permitting firms to communicate ranking information is to help students to decide whether or not to accept an offer they may have received from a nonparticipating firm.

The centralized clearinghouse in the Canadian articling market seems to be working, although the regulations also show that this market requires some careful maintenance. The central remaining problem with the Canadian articling match is the heavy reliance on summer positions to "audition" articling candidates. In this respect the market has sharp tendencies toward stage four unraveling. There is significant interaction between the market for articling positions and the market for summer associateships for students who have completed their second year of law school. This is not a recent development but rather one with which the articling market has dealt for a long time. As a partner at the Toronto law firm of Blake, Cassels and Graydon observed roughly a decade ago:

> Students now feel virtually compelled to obtain a summer job in Toronto after their second year in law school and as a result, a substantial portion of the articling hiring process has now been placed on the shoulders of the summer program. Students are being hired for summer positions halfway through their second year in law school . . . . Everyone recognizes that this is a back-door method of obtaining an articling position.[115]

The market for medical residencies is marked by the same stage four tendencies in a number of subspecialties, as described just below.

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[114] Id at A.9, A.11 (emphasis omitted).

[115] Roth and Xing, 84 Am Econ Rev at 1024 (cited in note 3) (quoting correspondence from Barry McGee to Alvin E. Roth, Mar 25, 1991).

6. Medical residencies (again).

As described above, the medical market adopted a centralized clearinghouse after the failure to organize a successful stage two market in the middle of this century. But, as in the Canadian articling market, the selection process in certain medical subspecialties may in fact begin well before the centralized match. In highly competitive areas such as orthopedic surgery and neurosurgery, preference for residency positions is often given to candidates who have done audition electives with the program in question.[116] These auditions last several weeks and give the program and student a chance to become acquainted with one another well in advance of the centralized match.[117] Since students can audition with only a few programs, and programs can offer auditions to only a few students, the auditions represent a form of "prematching," where some selection occurs on both sides well before the centralized match.[118]

Note that sometimes (in other markets, including the American market for new law school graduates) summer or "elective" positions do *not* reflect efforts to circumvent stage three mechanisms. These positions may exist even in markets without a stage three (or stage two) regime because they provide employers with useful information about candidates, or candidates with useful information about employers, prior to entry into a more permanent commitment. An obvious example here may be summer associate positions at American law firms; these positions do not represent an attempt to "prematch" in advance of a centralized procedure or specified offer date (since neither exists in this market, although once an offer for a permanent associateship—which may be made at any time—is made, the National Association for Law Placement regulates the amount of time for which it must be kept open[119]). Rather the summer associateship seems to be a way for law firms to gather information about candidates and provide information to them about the firm. Interestingly, though, the dates of appointment for summer associateships at American law firms *themselves* have unraveled over the years;[120] thus, instead of the summer associateship being a way *around* a mechanism adopted to *control* unraveling, the market for summer associateships is itself subject to unraveling.

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116 See id at 1023.

117 Id.

118 Id at 1023–24.

119 See *Principles and Standards for Law Placement and Recruitment Activities*, in National Association for Law Placement, *Member Handbook & Membership Directory* 29, 33–34 (NALP 2000).

120 Roth and Xing, 84 Am Econ Rev at 1004–05 (cited in note 3).

## IV. THREE DECREASINGLY MODEST PROPOSALS FOR GOVERNING THE MARKET FOR FEDERAL JUDICIAL LAW CLERKS—AND HOW THEIR CHANCES OF SUCCESS CAN BE MADE LESS BLEAK

What can be done about the law clerk market? The possibilities for reform (or not) are familiar from past experience and the existing literature: (1) Let the market go without attempting to regulate it (so that it will remain at stage one); (2) Establish a start date for offers and perhaps also interviews (the stage two solution, tried several times in the past); and (3) Institute a centralized clearinghouse (the stage three approach). As noted above, because there is a range of existing opinion on reform, we consider each of the three possibilities just described rather than focusing on a single one. We attempt to describe how each could best be implemented and what its odds of success are in light of what we know from our empirical evidence about the law clerk market and the experience of other markets. Ultimately we conclude that a centralized matching system for those judges who wish their clerks to be eligible for United States Supreme Court clerkships holds the most hope for reforming the presently unraveling market.

### A. The "Do Nothing" Approach: A Decentralized Market in Which Participants Are Free to Act As They Wish

Despite what seems to be a reasonably broad consensus among judges, clerks, and observers that the market for federal judicial law clerks is not working particularly well, a number of judges responding to our surveys expressed strong support, often in colorful terms, for the "do nothing" approach. Their comments are summarized in Table 21. These statements were not made in response to a specific question about the desirability of regulation; they were offered in response to an open-ended question asking judges whether there was anything else they would like to share with us about their views of the law clerk market.

## TABLE 21
## JUDGES' CRITICISM OF EFFORTS TO REFORM THE MARKET FOR FEDERAL JUDICIAL LAW CLERKS

| Survey | Comment |
|---|---|
| 1999 Survey #54 | I think that it is a waste of time to try to devise 'systems' for this 'process'. I get excellent clerks in the free market and I see no need for regulation (but then I never do). |
| 1999 Survey #51 | Cartels do not work. People cheat. Judges cheat. Law schools cheat. Attempts at regulation are an attempt by established eastern law schools, especially Harvard whose professors are conducting this survey, to improve their lock on the market. |
| 1999 Survey #60 | Is this an attempt to resurrect the 'East Coast Law School Cabal?' |
| 1999 Survey #12 | Forget it! Leave it up to the judges and the applicant when to interview, apply or hire. |
| 1999 Survey #14 | The free market should govern the process. Government intervention is not justified. If judges want to make offers on the basis of insufficient data they should be free to do so. If students want to accept clerkship offers after one day of law school thereby passing up better opportunities later, the market should allow them to do so. |
| 1999 Survey #37 | I would leave it alone and just let judges and law clerks do what they want to. Laissez faire. |
| 1999 Survey #72 | I will refuse to be bound by any combination agreement or conspiracy in restraint of trade. All cures are worse than the "disease".... Leave it alone and get out of our hair.... Free trade is the best. I do not believe the system is either chaotic or bad. Get off it. |
| 1999 Survey #84f | I have no problems and would be happy if nobody tries to impose rigid rules on me or anyone else. |
| 2000 Survey #38 | [T]he less regulation[ ] the better. I have never had any problem handling the process of hiring law clerks.... [T]he system is fine as it is. |

*Source*: 1999 and 2000 Judge Surveys.

What is likely to happen if, in accord with these sentiments, the market is left unregulated?

1. Prognosis.

Grim. Hiring will continue to occur in a frenzied manner and is likely to move back even further in the student's law school career, so that even less information is available. As already noted, in 1999–2000 interviewing commenced in mid-fall of the second year of law school, and there is no reason in principle why it could not move back until late in the summer after the first year (when, indeed, travel for interviews might be particularly easy); no new information emerges between the late part of the summer (after spring grades, law review selection, and references from professors for whom students may have worked as summer research assistants become available) and the early to middle fall. It is even possible that hiring would move back to the beginning of the second semester of first year, by which time first-semester grades would be available (except at Yale, where all first-semester classes are pass-fail; Yale students would thus be at a significant disadvantage). The good news is that clerkship hiring probably cannot move any earlier than the first semester of law school.

2. Palliatives.

While we are waiting to see how early is early, judges could be encouraged to enter their hiring schedules in a generally available database. Indeed, an approach along these lines was instituted last year by the Administrative Office of the United States Courts.[121]

An information database would, *if* there were a reasonable degree of participation, and *if* participating judges provided accurate dates in a timely manner, ameliorate some of the existing confusion about judges' timing, and this would certainly be a valuable service. However, neither of the two conditions just noted is likely to hold. The judges who move early to gain a strategic advantage over other judges are unlikely to participate in a database for precisely the reasons that drive them to jump the gun in the first place. If it is widely known that they are moving at a given time, other judges are likely to move up their schedules in response, and this will reduce the competitive gain from going early. Consistent with this suggestion, relatively few court of appeals judges list their hiring times in the Administrative Office database.

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[121] See Administrative Office of the U.S. Courts, *Looking for a Federal Clerkship? Look On-Line* (Oct 10, 2000), available online at <http://www.uscourts.gov/Press_Releases/press_10102000.html> (visited Feb 16, 2001) (describing the Federal Law Clerk Information System, a free public database containing information on law clerk vacancies and judges' hiring practices).

A further reason for limited participation is that once some judges are not participating in the database, other judges will be reluctant to commit to particular dates for hiring clerks because developments in the market may cause them to want to move earlier; alternatively they may specify particular dates in the database but then feel compelled to move earlier as a result of changes in the market. Indeed, even without a centralized database this sort of problem comes up. Before the creation of the Administrative Office database, chambers frequently told law school placement offices that they would begin the hiring process on a certain date but then departed from this date as changes occurred elsewhere in the market. For all of these reasons, a centralized database is unlikely to address the fundamental problems in the market for federal judicial law clerks.

### B. If at First You Don't Succeed, Try Again: Set Start Dates

If remaining in stage one seems unappealing, what about a stage two solution? The key feature of a stage two approach would be that some authority would set (1) a start date for offers, and perhaps also (2) a start date for interviews, a length of time for which offers must be left open, or both in an effort to govern the market for federal judicial law clerks. Obviously various incarnations of this approach have been tried, and have failed, on several past occasions in this market.[122] Also, as the vignettes above show, such approaches have been tried, and have failed, in the markets for medical residencies, college football bowls, clinical psychology positions, and Japanese university graduates. Indeed, many of the markets listed in Table 20 have at some points in their history attempted to organize themselves as stage two markets but have failed and either have slipped back into stage one or have adopted a more centralized (stage three) organization.

The point is in fact very general: We are aware of no market that has successfully organized itself as a stage two market for an extended period without problems of the sort observed in the markets discussed above. The clinical psychology market is the closest case, but even there, as noted above, there were serious problems of congestion and informal agreements prior to the specified Selection Day, and this market has now moved to a stage three organization.[123]

Do the same factors that explain the failures of stage two approaches in the other markets explain the past failures in the law clerk market? Might a new and improved stage two approach work in the latter setting?

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122 See Becker, Breyer, and Calabresi, 104 Yale L J at 208–21 (cited in note 8).

123 See Part III.B.3.

1. Prognosis.

Grim. There are several problems, illuminated by the experiences of the markets described in Part III.

*a) Congestion.* The first difficulty is that even if the start date were fully adhered to by all parties (an unlikely outcome, as we discuss below), there would be severe congestion in the market on the start date, and this would preclude participants from considering a range of possible transactions before making their decisions. Our earlier discussion of the medical residency market in the late 1940s is illustrative; the reason that the stage two solution failed was not that the start date was not adhered to, but that there was severe congestion in the market on the start date.

Within the category of start-date regimes, there are two main approaches. Under the first, there is an offer start date and then either an earlier start date or no start date for interviews. This was the situation in the clinical psychology market prior to the institution of the centralized match. As described above, substantial congestion occurred on Selection Day in this market. Past reform efforts in the law clerk market likewise demonstrate the problem. Judge Wald's account of the 1989–1990 clerk market, when the Judicial Councils in many circuits had adopted a deadline of May 1 at noon (Eastern Standard Time) for offers, with a consensus on a one-hour minimum response time and no limits on interviews prior to May 1, is representative in its essential features:

> [T]he major complaint was the frenzy with which offers had to be made and accepted. Those judges who gave their choices time to reflect found themselves severely disadvantaged. The one-hour window collapsed as applicants felt constrained to accept the first offer tendered. A judge who did not get through to an applicant at 12:00 noon was often too late. "I got my first choice," one judge complained, "and, after that, having given the applicant a half hour, I found my next 8 or 9 choices gone." By 12:15 virtually all of the bidding in the D.C. Circuit was over. Between 12:00 and 12:15, judges were making offers on one line as calls came in on a second from frantic applicants trying to learn if they were to get an offer before they responded to the offer of another judge.[124]

Congestion problems of this sort are likely to be severe in markets with offer start dates and earlier, or no, start dates for interviews.

The second possible approach is to have the offer start date also be the interview start date. This was effectively the situation under the most recent attempted reform of the law clerk market, under which in-

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124 Wald, 89 Mich L Rev at 159 (cited in note 2).

terviews were not supposed to occur (under a "nonbinding" Judicial Conference guideline) prior to March 1.[125] Under this guideline there was no official regulation of offer times, but one presumes that most judges would not hire applicants for "the most intense and mutually dependent [relationship] I know of outside of marriage, parenthood, or a love affair"[126] without an interview, although a few judges do take this route.[127]

The difficulty with requiring a common start date for interviews and offers is that neither judges nor students will be able to conduct or participate in many interviews. The experience with the March 1 regime was that "both interviews and offers bunched around the March 1 date, so students had little latitude in scheduling interviews"[128] and little opportunity to interview with a range of judges (and conversely so for the judges).

*b) Cheating.* Alongside congestion, the second and equally fundamental problem with a stage two solution is that it is virtually impossible to prevent defections from the specified start date. This has happened before in the law clerk market, and it is the overwhelming consensus of judges that it would happen again. Both our 1999 and our 2000 surveys posed the following question to judges: "If the Judicial Conference established, by rule, a firm start-date for interviews of September 1 of the third year of law school, do you believe that all or virtually all court of appeals judges would adhere to this date (in spirit as well as in letter)?" 72 percent of responding judges in 1999, and 74 percent in 2000, stated that they did not believe all or virtually all of their colleagues would adhere. Our survey showed that most judges say they are willing to comply if others are (93 percent in 1999, and 92 percent in 2000), but the problem is that they do not believe that most others will comply.

The problem is the familiar one of trying to sustain a self-enforcing cartel—one in which there is no outside sanction for defection. In general a cartel is much easier to sustain if strong outside sanctions exist to punish defectors. In the case of ordinary cartels, antitrust law denies enforcement of any explicit agreements, thereby eliminating most of the effective outside means of sanctioning those who defect. Likewise in the context of a start date for the law clerk market, the ability of some central authority to mete out punishments to judges who defect is limited by the institutional constraints surrounding the judiciary. Particularly because cheating may be far from explicit (as discussed below), it is difficult to imagine draconian pun-

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125 See Becker, Breyer, and Calabresi, 104 Yale L J at 207–08 (cited in note 8).

126 Wald, 89 Mich L Rev at 153 (cited in note 2).

127 See, for example, 1999 Judge Survey #52.

128 Becker, Breyer, and Calabresi, 104 Yale L J at 219 (cited in note 8).

ishments being handed out to Article III judges. The lack of explicitness, as well as other factors, likewise make it difficult to imagine handing out strong punishments to clerkship applicants who were interviewed or hired before the specified date.

So only a self-enforcing arrangement among judges is realistically possible. But of course the difficulty of sustaining such an arrangement is well known. The problem is particularly acute in the clerkship context, since parties cannot compensate those who are disadvantaged by the arrangement for their losses. In an ordinary cartel, conflicts of interest among members, if they exist, can be smoothed over by compensation; for instance, a seller who would prefer a higher price than the other members of the cartel can be given a larger sales quota. But there is no obvious way for a judge who is disserved by a given start date to be compensated for the losses he or she would incur from compliance with that date.

It is clear that some judges lose from specified start dates. Obviously, those judges who wish to gain a strategic advantage over other judges by jumping the gun are disadvantaged. This is related to our earlier observation that the unregulated market is unlikely to be Pareto inefficient: at least a few judges are likely to be made worse off if the bargaining gain they enjoy from jumping the gun in an unregulated market is eliminated.[129]

But other judges would want to defect as well; this is a consequence of the congestion caused by a start-date arrangement (hence the defection problem is linked to the congestion problem discussed above). Our description of the clinical psychology market above precisely illustrates the problem.[130] The congestion on the start date produces pressure on parties to arrange deals in advance in order to avoid the problems that come up on the official start date. The problem may be particularly acute when, as in the 1989–1990 law clerk market, there ends up being no minimum time that offers must be kept open.[131] Here the market is likely to be over very quickly, and thus a judge has reason to think that any candidate not reached very quickly will probably be committed to someone else. Then the judge has reason to be reluctant to make an offer to a candidate who is likely to want to hold it for a long time (and as the earlier quotation makes clear, a long time can be measured in minutes). Thus, in deciding to whom to make an offer, the judge has some reason to favor candidates who have indicated a willingness to accept offers quickly. So, in turn, candidates have an incentive to let judges know that they

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129 See Part I.B.1.

130 See Part III.B.3.

131 See text accompanying note 124.

will accept their offers, since this makes it more likely that an offer will be received. Indeed, in the 1989–1990 law clerk market, "[s]avvy clerk applicants . . . played their own hands. They (or sometimes their sponsoring professors) called chambers in advance to announce that that particular judge was the first choice."[132]

Yet another reason that defection is hard to control with a stage two approach in the law clerk market is that defection will often be difficult to detect (and hence will be relatively easy to get away with). Often it is not public knowledge when a clerk is hired. Recall our earlier anecdote (in Table 15) about a judge asking an interviewee to sneak in the service entrance on a Sunday.[133] Without some way of verifying when hires were made or contacts occurred, it is difficult to police defections from a start-date arrangement (even if enforcement were feasible once defection had been detected).

The problem with start dates is not only that they will be undercut by defectors—although this is a problem. The problem is that these defectors make the judiciary look bad, a concern that many judges have voiced and that was discussed above. A system, such as this one, that depends on honorable behavior also tends to penalize the honorable and put honor in bad repute. As one judge said on our survey with regard to "cartel" solutions: "All you do is create an incentive to cheat—on the part of students and judges alike."[134]

This sort of concern was precisely what motivated the Judicial Conference's September 1998 abandonment of the March 1 benchmark start date for interviews. Judges who did not honor the start date were thought by the Judicial Conference to be engaging in a public act of lawlessness (even though there was no official "law" to be broken).[135] For similar reasons, the NCAA and the Japanese Ministry of Labor gave up trying to regulate their respective markets; they felt that their decisionmaking bodies were cast in a poor light by having made rules that many were not following.[136]

2. Palliatives.

Could some degree of compliance be achieved if each year, at the close of the market, all clerk candidates were surveyed, and a summary of the year's events were circulated, indicating when first contacts were reported, whether and when there were agreements in violation of any start dates, and so forth? The great difficulty here would be that the re-

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132 Wald, 89 Mich L Rev at 158 (cited in note 2).

133 See Table 15 (1999 Student Survey #154).

134 1999 Judge Survey #84d.

135 Although there is no official record of this sentiment, one of us (Posner) attended the meeting in question and can testify to the content of the discussion.

136 See Roth and Xing, 84 Am Econ Rev at 1012 & n 24, 1016 & n 33 (cited in note 3).

port would of course have to preserve student anonymity, and probably also omit judge names (no student is going to report that Judge *X*, for whom the student will be clerking, made an informal deal in advance of the start date), and without student or judge names it seems doubtful that the report would be very useful.

Another possible palliative would involve limiting the information available to judges prior to the start date. Making it more difficult for judges to gather information will impede their ability to move early, and so (for example) the strategy of asking law schools to embargo letters of recommendation until February 1, a strategy adopted by the Judicial Conference in 1993 in connection with its establishment of a March 1 start date,[137] was a sensible way to try to reinforce the (failed) attempt to establish a later appointment date. The fact that just such a strategy was partially successful in the American medical market in the 1940s gave grounds for at least cautious optimism, especially since in the medical market this strategy was effective at moving the date of appointment back very substantially.[138]

But the law clerk market, or at least the most competitive segment of this market, is substantially smaller than the medical market.[139] In light of the size of the law clerk market, the success or failure of any reform that depends in part on an embargo on letters of recommendation may succeed or fail based on how nearly universal compliance is achieved. Even a relatively small set of "leaks," if they systematically concern the most competitive part of the market, has the potential to defeat the intent of the embargo. And it is very difficult to prevent *all* leaks. It is particularly difficult to control informal contacts by telephone, and these appear to be common in the law clerk market.[140] Of course when other professors are offering phone recommendations prior to the specified date, refusal by a given professor may harm his or her own students. So the temptation to talk to a judge who has already started gathering information about other candidates may be considerable.

In addition, as already noted, even if defections are perfectly controlled, the start-date approach does not work well in giving parties a chance to consider a wide range of possible transactions; the problem of congestion will remain. And there are no palliatives for *that* prob-

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137 See Becker, Breyer, and Calabresi, 104 Yale L J at 214 (cited in note 8).

138 See Part III.B.1.

139 Judge Wald notes, "Thus, in any year, out of the 400 clerk applications a judge may receive, a few dozen will become the focus of the competition; these few will be aggressively courted by judges from coast to coast." Wald, 89 Mich L Rev at 154–55 (cited in note 2).

140 See Becker, Breyer, and Calabresi, 104 Yale L J at 219 n 36 (cited in note 8) (quoting a letter from a law school dean suggesting that in 1994 professors at other law schools communicated with judges by phone before the authorized date).

lem. As noted above, the start-date approach in the market for medical residency positions was abandoned even though there did not appear to be significant problems with defection; the reason was that the problems with congestion were thought to be intolerable.

### C. The "Monkey See, Monkey Do" Approach: Adopt the Medical Matching System As Is

Many of the markets discussed in Part III, as well as numerous others listed on Table 20, have progressed from stage one to stage two to stage three, with the final move coming after the (inevitable in all markets with which we are familiar) failure of a stage two solution. A stage three solution involves a centralized matching system, which allows participants' preferences to be considered in an orderly way and permits one to set the timing of the market at a desired point (say, the third year of law school for the market for federal judicial law clerks), as is currently the case in the market for medical residencies.

One possibility would be to adopt the medical system as is. Several commentators have urged essentially this approach for the law clerk market.[141] Here is a recent succinct description of the medical match:

> Each year . . . graduating physicians and other applicants interview at residency programs throughout the country and then compose and submit Rank Order Lists (ROLs) to the NRMP [National Resident Matching Program], each indicating an applicant's preference ordering among the positions for which she has interviewed. Similarly, the residency programs submit ROLs of the applicants they have interviewed, along with the number of positions they wish to fill. The NRMP processes these ROLs and capacities to produce a matching of applicants to residency programs.[142]

A few points bear emphasis here. First, the matching occurs *after* personal interviews have been conducted. Neither residency programs nor candidates are expected to make choices sight unseen for what are relationships in which personality certainly may matter.[143]

Second, under the matching system participants can never gain from submitting rankings that depart from their true preferences. In other words, there is no possibility of gaining from ranking parties on

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141 See Norris, 81 Cal L Rev at 791–98 (cited in note 72); Oberdorfer and Levy, 101 Yale L J at 1098–1108 (cited in note 41); Wald, 89 Mich L Rev at 160–63 (cited in note 2).

142 Roth and Peranson, 89 Am Econ Rev at 748 (cited in note 9).

143 Roth, 92 J Pol Econ at 995 & n 6 (cited in note 71).

the other side in a strategic manner based on impressions of how those parties will be ranking the initial party.[144]

Third, the medical match reflects purely the preferences of the participants for pairing with one another. It does not reflect some broader aspect of social planning or engineering by a central authority. The match is simply a way of facilitating the parties' expression and achievement of their preferences, an opportunity that is lacking in an unregulated market with timing problems.[145]

Fourth, the process is completely confidential. Neither side ever learns how the other side ranked it.[146] This seems critical in the clerkship context, as no student would want the judge for whom he or she will be clerking to know that the student ranked that judge far down on the list.

Fifth, the matching system is set up to accommodate the preferences of married couples who wish to be in the same geographic region.[147] It is also set up to accommodate other specialized preferences of applicants and residency programs, as discussed more fully below.[148]

Might the medical match approach work in the law clerk market?

1. Prognosis.

Not promising. The medical match does away with one of the central problems identified above for a stage two solution—the fact that congestion may occur on the start date. But the problem of implied agreements between participants as a way of getting around the strictures of the imposed agreement remains. Since judges and candidates are permitted to meet for interviews before the match date, "offers" and "acceptances" can be communicated well in advance of the centralized match. Just as in the situation of the market for Canadian articling positions,[149] there is nothing here to stop a judge from saying to a candidate: "I'll rank you first in the match if you rank me first." Or consider a judge who is more subtle, saying to a candidate:

> You are my first choice. If I knew that I was your first choice, I would just decide now to rank you first in the match. Of course, if I am not your first choice, I need to consider other candidates, and we won't have any mutual commitment. But if you tell me that I am your first choice, then I will know that you will rank me

144 Roth and Peranson, 89 Am Econ Rev at 770–72 (cited in note 9).

145 Id at 748.

146 Wald, 89 Mich L Rev at 161 (cited in note 2).

147 See Roth and Peranson, 89 Am Econ Rev at 758–59 (cited in note 9).

148 See id at 758–59 & n 8; Part IV.D.3.c.

149 See Part III.B.5.

> first on your form, and I'll relax now and not worry about other candidates.

The subtext is:

> Of course, I'm not asking you to make a commitment of the kind that we're not supposed to make. That would be unethical on my part. I just want to understand your preferences—that is part of what I try to accomplish at an interview. Of course, only an unethical cad would mislead me about his or her preferences, so I know that I can rely on what you tell me.

No system will work unless it makes this kind of conversation untenable.

How is this sort of problem avoided in the medical match? Certainly it is not entirely avoided; estimates suggest that 10 percent to 15 percent of students are urged to make informal commitments to residency programs prior to the match date.[150] However, there has not been enough "winking" and "nodding" of this sort to bring down the system or even weaken it in any significant way. The critical difference from the law clerk market seems to be that informal promises are far more likely to be binding when made to federal judges than when made to residency programs. Studies of the medical match suggest that students feel residency programs often lie to them,[151] and this may make students more willing to violate a supposed informal understanding (since they feel residency programs do this all the time). A key feature in the law clerk market may be the relatively small number of judges in the relevant sector of the market. This is an interesting feature of the law clerk context, since ordinarily smaller markets make coordination easier. Here the small size of the market seems to make informal agreements easier to enforce, and it is these informal but binding agreements that present potential problems. Thus, just as the ability to make informal agreements caused problems with the stage two solutions in the markets for college bowls, clinical psychology positions, and Japanese university graduates, this ability makes wholesale adoption of the medical

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150 See Clark, 83 Georgetown L J at 1783 (cited in note 72) (reporting 1990 survey results according to which 10.4 percent of students nationwide were pressured to make informal commitments prior to the centralized match); Richard D. Pearson and Allison H. Innes, *Ensuring Compliance with NRMP Policy*, 74 Acad Med 747, 747 (1999) (reporting that 15 percent of 1996 and 1997 graduates of the University of Virginia School of Medicine were asked for signals concerning what rank order list they intended to submit to the centralized match).

151 For instance, a recent study found that 33 percent of students surveyed felt that residency programs had lied to them during the process, and 58 percent of students who were told by programs that they would be ranked highly were skeptical of the sincerity of those statements. See Kimberly D. Anderson, Donald M. Jacobs, and Amy V. Blue, *Is Match Ethics an Oxymoron?* 177 Am J Surgery 237, 238–39 (1999).

model in the law clerk setting—as several prior commentators have advocated—highly problematic.

2. Palliatives.

Adopt a modified medical match. (See below.)

D. A Modified Medical Match

1. Solving the problem of informal agreements.

Since informal agreements intended to circumvent a centralized match seem so likely to be problematic in the law clerk market, a successful centralized process would have to have a way of preventing them. One step the Canadian articling market discussed above has taken in response to this problem is to require students to affirm on the form on which they submit their ranking lists that they "have not accepted an articling position nor made a commitment to article in the [upcoming] articling year."[152] We propose a similar approach for the law clerk market: each judge and each student who participates in the centralized match should be required to certify, as a condition of participation, that no prior understanding or agreement with a student or a judge has been reached. The idea is to make destabilizing early agreements nonbinding.

One way in which this certification requirement would make such agreements nonbinding is that parties on the receiving end of impermissible overtures seeking informal understandings would presumably feel less bound to adhere to such understandings, given their explicitly forbidden status as reflected in the certification requirement. A second, and critical, reason the certification requirement might work is that if participants are explicitly required to certify that no informal understanding was reached prior to the match, then a judge who attempted to engineer such an understanding would not be in a strong position to retaliate against any student (at least in an overt manner) who ended up not ranking the judge highly. That is, it is hard to imagine a judge complaining to colleagues, law professors, Supreme Court Justices, or anyone else who might be in a position to influence a particular applicant's future that the applicant did not stick to an informal understanding that the judge and candidate were explicitly required to certify they did not make. And since students have far less power to retaliate against judges, there seems little reason to worry about the problem from that end.

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152 See, for example, 1999 Ontario Articling Student Matching Program Student Rank Order List (on file with authors).

Of course, each of the reasons just given also suggests that a similar sort of certification might be helpful in the context of a stage two solution of the sort discussed above. But, as noted above, defections are only one of the problems with a stage two solution. The other major problem, which in fact is exacerbated when defections do not occur, is congestion on the start date. This congestion prevents parties from considering a range of options before making their decisions and, in the medical context, led to the adoption of a stage three mechanism apparently without substantial problems with defection.

2. The scope of the centralized process.

A critical question in the context of a centralized matching process for the market for federal judicial law clerks would be the scope of the match. The medical model is that all (or virtually all) employers are included. But this model would not make sense in the law clerk market, at least as a starting point. The comprehensive model very quickly runs up against the fact that a not insubstantial number of judges would probably be highly resistant to the idea of a centralized match. In a 1989 survey of judges, only one-third expressed support for a centralized match[153]—although a very important caveat here is that in the dozen years since 1989 the market has experienced many more debacles and several additional failures of attempts to impose stage two solutions, meaning that the openness to a stage three approach might be greater.

A match of comprehensive scope also overlooks what seems to us to be a very important feature of the law clerk market. This feature, which emerges strongly from our judge surveys, is that there are two groups of judges: those who are engendering the problems in the market, and the rest of the judges, who perceive no problem obtaining qualified clerks and are not eager to be part of any "solution" to what they do not consider to be their problem. The judges who *are* the source of the problem may or may not be eager to be part of a proposed solution, but whether they are eager or not, they are in a different category, we think, from judges who are both resistant to solutions and not the source of the problem.

The two groups of judges differ not only in whether they are the source of the problem, but also (and relatedly) in whether they think it is difficult to obtain desired clerks. The first group of judges seems to think it is difficult to obtain the clerks the judges desire, while the second does not view this as a problem. Judges Wald and Kozinski are in the former camp,[154] and the judge-author of the present Article (Pos-

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153 See Becker, Breyer, and Calabresi, 104 Yale L J at 222 (cited in note 8).

154 See Kozinski, 100 Yale L J at 1708 (cited in note 1); Wald, 89 Mich L Rev at 153–55 (cited in note 2).

ner) agrees with that point of view. Our judge surveys provide many examples of judges in the other camp, as reflected in the comments in Table 22.

**TABLE 22**
**JUDGES' PERCEPTIONS OF A BIFURCATED MARKET**

| Survey | Comment |
|---|---|
| 1999 Survey #101c | I have never understood the serious competition between judges for clerks. For nearly a quarter of a century, I had fine clerks, turning down dozens of applicants who would have been equally fine. Of course, I was employing clerks—not judges! |
| 1999 Survey #9 | There are far more well qualified applicants than there are positions available in the federal system. |
| 1999 Survey #83 | There are far more good candidates than clerkships. The notion that we judges have to compete with one another is misplaced. It's a buyer's market. |
| 1999 Survey #2 | Although I do not interview, as a rule, until the winter or spring of the year in which the law clerks start work, I have never had any problems obtaining satisfactory law clerks. |
| 1999 Survey #4 | There are plenty of able people out there. |
| 1999 Survey #8a | [T]here are plenty of good candidates. |
| 1999 Survey #8b | I do not participate in the unseemly "rush" of second-year law students (they have only one full year of grades when they apply) for judicial clerkships. I interview in May and June of the year preceding the Court year for which they are hired and find many qualified candidates. |
| 1999 Survey #10 | There are always excellent candidates available even late in the year. |
| 1999 Survey #27 | Even though hiring after only 3 semesters of law school is quite early, my expertise of almost 10 years indicates that regardless of the national strictures, I have a plethora of excellent applicants to choose from *after* the super-stars have been cherry-picked—I am just not bothered by the "sooners," largely because I'm not that interested in [unreadable]-hunting for #1 grad and top 5 schools. |
| 1999 Survey #30a | I do not find the system flawed. Hiring competent clerks has not been a problem. |

**TABLE 22**
**JUDGES' PERCEPTIONS OF A BIFURCATED MARKET**
**(CONTINUED)**

| Survey | Comment |
|---|---|
| 1999 Survey #34 | There are far more qualified applicants than available positions. |
| 1999 Survey #57 | There are plenty of good law grads to go around. |
| 1999 Survey #68 | There are a lot of smart people out there. |
| 1999 Survey #89 | In the past two years I have not hired until spring of the year they begin clerking. While the field is much smaller, I am content that I have harvested clerks roughly equivalent to those hired from the primary competitive field. I have not had to lower my demanding standards. |
| 1999 Survey #95 | There are plenty of well-qualified law school candidates out there. . . . This "competition" business is nonsense. The judges so obsessed with getting the very best must be awfully insecure about their own abilities and intellect!! |
| 2000 Survey #99 | [C]ompetition or not, I have always been able to secure fine clerks. |
| 2000 Survey #25 | I have found many qualified candidates after the somewhat hysterical selection process undertaken by many appellate judges in the early spring. |
| 2000 Survey #47 | There are many more well-qualified candidates than clerkships. |
| 2000 Survey #102 | There are plenty of outstanding applicants. I have always been "behind the curve" in hiring but have always been able to secure wonderful people to fill these positions! |
| 2000 Survey #91 | I am disgusted by the "rat race" to hire prestigious law clerks. I refuse to take part in it, and by doing so I have discovered many highly qualified people—passed over by others—who have been excellent law clerks. |
| 2000 Survey #69 | There are lots of great fish in the sea. Without trying very hard, I have gotten consistently excellent clerks, from many different law schools. |

**TABLE 22**
**JUDGES' PERCEPTIONS OF A BIFURCATED MARKET (CONTINUED)**

| Survey | Comment |
|---|---|
| 2000 Survey #63 | It's a pain, mainly because there are a small number of grotesquely aggressive judges out there who seem to think that if they don't get x or y to clerk for them they'll somehow suffer [irreparable] injury! They need to chill out! |
| 2000 Survey #72 | This is a "big, fancy law school" problem. If my colleagues weren't such snobs about where their clerks come from, we'd be a lot better off. |
| 1999 Survey #82 | The judges who advertised themselves to the law schools as running farm clubs for the Supreme Court seem to be energizing most of the competitive problems. |
| 2000 Survey #83 | This is a big school, fat-headed judge problem. Go away and leave us alone. I'm serious. |

*Source*: 1999 and 2000 Judge Surveys.

There are two possible explanations for the perceived limits on the pool of top candidates in the view of the first group of judges. One possibility is that the number of judges who perceive the need to hire "top" candidates is large relative to the pool of such candidates. But perhaps a more important explanation relates to the issue of Supreme Court clerkships. Many judges want to attract applicants who will go on to clerk at the Supreme Court, not only because of the intrinsic value of these clerks as a result of their high ability, but also because such applicants have instrumental value to the hiring judge in that they make the judge more attractive to future candidates.[155] The role of Supreme Court clerkships can explain why there is always a shortage of "best" clerks, since there is a fixed number of Supreme Court clerkships. It can also explain why many judges (those not competing to be Supreme Court feeders) seem to think that clerk quality is not a big issue at all.

Picking up on the role of the Supreme Court, our proposed model for a centralized match is that participation be required *for those judges who wish their clerks to be eligible for Supreme Court clerkships*, with enforcement by the Supreme Court in a manner discussed more fully below.[156] Thus, a judge who chooses not to partici-

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155 See Wald, 89 Mich L Rev at 154 (cited in note 2).

156 One judge suggested what seems to be a similar two-tier system but as a means of en-

pate in the centralized match cannot feed any of his or her clerks to the Supreme Court. The judge (whether federal or state, and whether appellate or district court level) would decide whether to participate, and thus whether to be eligible to feed clerks to the Court. A student would regain eligibility for a Supreme Court clerkship by clerking for a judge who hired through the centralized match following a clerkship with a judge who did not hire through this procedure.

Our proposed approach has several advantages relative to a centralized match of comprehensive scope. First, it would not require participation from, and cause inconvenience to, the judges who are not the cause of any of the problems in the current market. This is a significant plus of the proposal. One of the clearest lessons from the experience in various medical markets is that the degree of participation of employers covered by the centralized process is critical to the success of the process.[157] A high degree of participation seems much more likely with the targeted approach than with a general approach embracing, for instance, all federal appellate judges. (This is not to deny that some judges, like Judge Kozinski, will nonetheless be highly resistant to our proposal.) On the other hand, it must be recognized that there may be some cost to requiring judges who want to hire outside the centralized match to self-identify as nonfeeders. But our hunch (although at this point it cannot be more than that) is that, at least insofar as federal appellate judges are concerned, only a minority would opt out of the centralized matching process and that these judges—the sources of the comments quoted in Table 22—do not have significant interest in being regarded as Supreme Court feeders anyway.

A second advantage of our targeted approach is that the great majority of judges who currently engender the "competitive problems" would almost certainly *not* want to opt out of the Supreme Court feeding pool (although they might wish that they did not have to participate in order to feed their clerks to the Court). Thus, the precise judges whose participation is most needed would be most likely to participate, whether happily or not, in the match.

Enforcement of our proposed approach would be in the hands of the Supreme Court. Would the Court go along? Our survey of the Justices showed essentially unanimous agreement on two points: first, the

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forcing a start date for offers, not a centralized match. The judge wrote, "[I]f all the Supreme Court Justices, or even a majority of them, announced that none of the group making the announcement would hire any law clerk who had been hired the year before in contravention of the rule set by the Judicial Conference, this would go a long way towards obtaining enforcement of the rule." 1999 Judge Survey #8c. As already noted, however, even if the problem of defection from a start date is solved, the problem of congestion on the start date remains and, in the medical context, led to the adoption of a stage three approach. There are also serious problems with detecting departures from a start date in the law clerk market.

[157] See Clark, 83 Georgetown L J at 1761–65 (cited in note 72).

current state of the market for federal judicial law clerks is a mess, and something should be done about it; and second, there are far more well-qualified applicants for Supreme Court clerkships than slots available at the Court. Thus, Supreme Court Justices are concerned about the status quo, and they would be unlikely to find it a significant burden to limit themselves to clerks hired through the match for initial clerkships, particularly given the judges who are likely to participate in the match (as discussed just above). Fundamentally, given the number of excellent applicants, there is little risk that a Justice would gain much from defecting and hiring a stellar person who did not participate in the match, since it would be easy for the Justice to hire a very good person who did participate in the match. This is not to say that the Justices would not perceive the regime to be a restriction on their freedom; they surely would. It is simply to say that the restriction would be limited in comparison to the significant potential benefit that they themselves—many of them former federal appellate judges—seem interested in achieving for the lower federal court system.

The most obvious difficulty with our proposed noncomprehensive model is that some judges who do not participate in the match may try to hire fairly strong candidates before the match; these candidates might be led to accept such offers if they are uncertain (as of course they often would be) about their chances of getting a clerkship with one of the "Supreme Court feeder" judges participating in the match. This would in fact be much like the problem that comes up in the present market; students accept offers from less preferred judges because they do not know whether offers from more preferred judges will materialize (see Table 10 above). This is precisely the problem a centralized match is designed to solve. So if substantial hiring did occur before the centralized match, a more comprehensive approach might be desirable. But the tailored approach, which recognizes the two-tier market that many judges feel currently exists, seems to us a good place to start.

3. Attributes of a centralized process.

A number of arguments have been advanced in the existing legal literature in support of a centralized matching process for the market for federal judicial law clerks, and a number of objections to these arguments have been offered.[158] Although the existing debate has focused on a comprehensive match rather than on the sort of match we propose

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[158] The literature here includes id at 1759–97; Kozinski, 100 Yale L J at 1721–24 (cited in note 1); Norris, 81 Cal L Rev at 791–98 (cited in note 72); Oberdorfer and Levy, 101 Yale L J at 1098–1108 (cited in note 41); and Wald, 89 Mich L Rev at 160–63 (cited in note 2).

here, many of the arguments and objections are similar. Since they have been well rehearsed, we discuss them fairly briefly.

*a) Ability to consider a range of options.* Most fundamentally, a centralized clearinghouse vastly expands the parties' ability to consider a wide range of options before making their decisions. This is the main advantage of a centralized matching system.

Some have objected to the idea of a matching system on the ground that judges might have to conduct more interviews under such a system.[159] This might well be true, particularly in the early years until judges learned how many interviews they needed to conduct in order to be sure they would fill their slots. At the same time, in light of the number of interview cancellations under the present system (see Tables 11 and 12 above), it might well be that too *few* interviews are being conducted at present. Moreover, with improvements in technology it may be that interviews can be conducted via videoconference. Already the Second Circuit is hearing a fair number of cases from upstate New York and Vermont by videoconference. A further point is that a judge's opportunity to hire will not be limited to the match; after the match is over, a judge would be free to hire on the open market, just as occurs now in the case of medical residents.[160]

In any event, the cost of having to conduct additional interviews seems to be a cost that many judges are willing to bear in exchange for a more orderly and sensible process. Our judge survey in both 1999 and 2000 posed this question: "In general, would you favor a regime (assumed to be fully enforceable) under which hiring occurred much later, say in the fall of the third year, and in an orderly fashion; under which interviews could be scheduled at a judge's convenience, without the pressure of 'beating' other judges; but under which more interviews had to be conducted?" 74 percent of judges said "yes" in 1999; 73 percent said "yes" in 2000. So, many—although not all—judges seem willing to bear the burden of more interviews in exchange for the benefits that a match might bring. It also seems likely that the judges most willing to bear the burden of more interviews are the ones most dissatisfied and frustrated with the present system and, thus, most likely to opt for participation in the targeted centralized match we propose.

*b) Reduced geographic bias.* A matching process would also significantly reduce the geographic bias that may arise under a stage two solution to the unraveling problem.[161] Because the process would

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159 See Clark, 83 Georgetown L J at 1766–70 (cited in note 72); Kozinski, 100 Yale L J at 1721 n 31 (cited in note 1).

160 Wald, 89 Mich L Rev at 161 (cited in note 2).

161 See Carl Tobias, *Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 Wis L Rev 919, 923–29 (discussing the bias under a stage two approach).

no longer be compressed into a very short time frame (as under a stage two approach and, indeed, also in today's unregulated market), judges not near major cities, where students can visit many judges in a short span of time, would not be as disadvantaged. Also, since interviews could occur at any time, candidates might be able to visit judges when they are in the area for other reasons. But the latter point should not be overstated: judges might well want to interview all of their candidates within a relatively compressed time frame, so as to be able to make comparisons, and candidates might not want to interview far earlier than other applicants for fear that they would be forgotten by the time the judge got around to making decisions on rankings for the centralized match. Thus it might be an overestimate to suggest, as some advocates of matching systems have, that students could interview at any time convenient to them, including while flying out to interview for jobs at law firms.[162] Still, at a minimum, interviews could be scheduled well in advance in a calm and nonchaotic manner.

Note that the same factors that suggest a reduced geographic bias also suggest reduced travel costs, since travel could be arranged in advance. Thus, although more interviews might, all else equal, mean higher travel costs for students,[163] all else is not equal; instead of buying non-advance-purchase tickets in order to come on short notice, students could buy discounted tickets, which are often only a fraction of the cost of full-fare tickets. If discounted tickets are generally one-third (say) of the cost of full-fare tickets, then students could do three times as many trips without increasing their travel costs.

*c) Balance and diversity of clerks.* The biggest objection that skeptics of a centralized match have voiced is that it interferes with judges' ability to ensure diversity and balance across clerks.[164] The idea is that the attractiveness of one clerk will depend on who his or her co-clerks will be.

This is an important point, but there are three responses to it. First, the argument may overstate the degree of control judges have in the *current* market. When a candidate is snatched away by another judge who has made an exploding offer, as Part II.C.1.a showed occurs frequently at present, the first judge is limited in his or her ability to achieve an optimally diverse and balanced mix of clerks.

Second, the fact that, as noted above, a number of judges make offers to a pool of candidates and fill their positions with the first of-

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162 Norris, 81 Cal L Rev at 794 (cited in note 72), offers such an argument.

163 See Kozinski, 100 Yale L J at 1721 n 31 (cited in note 1).

164 See Becker, Breyer, and Calabresi, 104 Yale L J at 221–22 (cited in note 8); Kozinski, 100 Yale L J at 1722 (cited in note 1).

ferees to accept suggests that at least some judges do not regard the composition of their clerk team as critical.[165]

Third, and most important, the algorithm used in some matching systems provides ways to deal with issues of diversity and balance. For instance, the clinical psychology match allows conditions such as that all candidates should not be from the same school. Similar conditions apply in some of the British medical markets, where, for example, Edinburgh surgeons are able to request what they regard as an appropriate gender balance among the students with whom they are matched.[166] In general, there is no theoretical difficulty in implementing restrictions of this sort, in which some candidates are viewed as substitutes for other candidates (for instance, candidates from the same school). Thus, it would be easy to allow judges to say (for example) "not all positions should be filled with candidates of the same sex."

*d) Impersonal nature of the match.* Another criticism that has been offered of a centralized match is that it would undermine the "highly personal relationship between judge and clerk."[167] Judge Kozinski writes:

> The selection process—for all its expense and pain and disappointment and hardship—is the crucible wherein the foundation of that relationship [between judge and clerk] is forged. The time the judge spends talking to professors and reading draft law review notes; the student's efforts devoted to reading the judge's opinions; the time judge and clerk spend in interviews; the weighing of competing possibilities—all these help bring the parties psychologically to the point where they are ready to make a commitment to each other.[168]

The difficulty with this argument is that all of these things would continue to happen under a matching system (interviews, talking with recommenders, clerk preparation for the interview, etc.). The only thing that would be absent is what Judge Kozinski describes later as the "electrifying" moment when a student says, "Yes, judge, I accept" in person (or on the phone).[169] Judge Kozinski asks, "How will the bond between judge and clerk be affected when offer and acceptance are so impersonal? How will the emotional content of the relationship be

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165 See note 43 and accompanying text (describing this strategy).

166 See Alvin E. Roth, *A Natural Experiment in the Organization of Entry-Level Labor Markets: Regional Markets for New Physicians and Surgeons in the United Kingdom*, 81 Am Econ Rev 415, 428–29 n 26 (1991).

167 Kozinski, 100 Yale L J at 1723 (cited in note 1).

168 Id.

169 Id.

diminished by the inherently protracted delay between interview and computer communication?"[170] Whatever the answers to these questions (and we doubt that the mode of offer and acceptance has much significance in the overall nature of the judge-clerk relationship), we would be surprised if, for most participants in the law clerk market, this issue outweighed all of the other serious problems and inefficiencies of a stage one or stage two market. The survey evidence described in Part II.C above certainly suggests that neither judges nor students generally regard the current process as an auspicious beginning to the judge-clerk relationship.

*e) Changes of mind.* Another issue raised by critics of a centralized match is that some candidates or judges might find their match unacceptable in reality "even though it might have seemed acceptable as a remote contingency far down a list of happier possibilities."[171] This is a concern, for saying yes to a specific offer out there (or making an offer to a specific candidate) seems different from listing a particular judge or candidate on a form that will be processed sometime down the road. But this risk must be weighed against the fact that candidates change their mind in the current market as well, as a result, we think, of the early time at which decisions must be made. For example, a few years ago a Harvard Law School student accepted an offer with a highly prominent D.C. Circuit judge two years ahead of the time at which the clerkship was to begin and then, a year or so later, informed the judge that he would not be doing the clerkship after all. With the market occurring at a later date and in a more orderly fashion, changes of mind on grounds of changed circumstances or changed preferences would be far less likely.

*f) Bargaining power.* One of the design questions that must be settled in constructing a match is which side of the market "makes offers" and which side "accepts or rejects" offers. (Of course these terms do not have their ordinary meanings in a centralized matching process, but the concept is similar to the notion of who makes and receives offers in a decentralized market.) In most matches we know of, this issue has been settled by appeal to the practice in the decentralized market; thus, in a match for the law clerk market, judges would retain the initiative. Interestingly, the recent redesign of the medical match reverses this; the match is now conducted so that medical students have the initiative, and (within the internal operation of the match algorithm) residency programs are treated as if they accept or reject the offers (or applications) of the students.[172] But it turns out that the two ap-

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170 Id at 1723–24.

171 Id at 1724.

172 See Roth and Peranson, 89 Am Econ Rev at 755–59 (cited in note 9).

proaches yield largely similar results as a practical matter in any event.[173]

4. Transition and administrative issues.

The medical match occurs in March of the last year of medical school. Ultimately a similar sort of time frame may be desirable for the market for federal judicial law clerks. But initially it might be best to have the law clerk market occur earlier than the winter or spring of the third year. The reason is that it might ease the transition. "Both the models and the experience of the many markets that have attempted to halt unraveling suggest that a cautious plan of attack" would be to introduce a central match "initially at an early time, when a substantial percentage of transactions are already taking place, and then to move the time at which the mechanism operates later only after it has attracted a high rate of participation."[174]

Having the process go early would mean that initially only the benefits from a more orderly process, and not the benefits from later hiring, would be achieved. But even the former benefits seem likely to be significant, particularly from the perspective of what seems to be the judges' primary concern, the way in which the process casts the judiciary in a negative light.

The modified match we have proposed here could be administered by an outside firm skilled in running matches such as the medical residency matching program and the clinical psychology matching program. Alternatively, the match could be administered by the Administrative Office of the United States Courts or some other judicially-related entity, presumably with some technical help from an outside organization.

5. Trouble signs in a modified match.

*a) Movement from a stage three to a stage four market.* A lesson from the markets discussed in Part III above is that even a stage three mechanism that is working well can on occasion be threatened by unraveling problems. One source of such problems is summer-associate-type positions that effectively amount to "prematching" in advance of the centralized match. This is stage four in the typology described in Part III.A.

The possibility of such "prematching" seems unlikely, however, to bring down a centralized match, assuming it gets up and running successfully. If "prematching" were to become very significant—as in the case discussed in Part III.B.5 above in which 80 percent of participants

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173 See id at 759–60.

174 Roth and Xing, 84 Am Econ Rev at 1038 (cited in note 3).

in a match submitted only one alternative, making it clear that everything had been settled in advance—then the centralized clearinghouse might have to be abandoned, but this has not occurred in other markets with centralized matches that produce stable outcomes. The situation of 80 percent prematching occurred in a match that used a nonstable matching algorithm.[175]

*b) Informal agreements.* A separate trouble sign in a modified match in the market for federal judicial law clerks would be the reliance of parties on informal prematch understandings (unrelated to summer-associate-type positions) notwithstanding the certification requirement described above.[176] A possible response, if such a problem were to develop, would be the use of a small degree of randomization in the match to destabilize the informal understandings. The somewhat speculative randomization proposal we offer here is meant to suggest one way of dealing with the problem of informal understandings in contravention of the centralized match. We realize that most judges are not accustomed to thinking in explicitly statistical terms, so this proposal may cause a certain culture shock.

Suppose that an anonymous hotline were set up to monitor compliance with the prohibition on informal understandings reflected in the certification requirement. If this hotline showed that some threshold of noncompliance had been reached (say 1 percent of candidates, or 1 percent of the total number of positions), then it could be announced that 5 percent (for example) of applicants would have their first and second choices randomized in the centralized match. That is, for 5 percent of applicants, there would be a 50 percent chance of having their second choice judge ranked as their first choice and vice versa. (If no second choice judge was listed, the student would have a 50 percent chance of not being matched at all.) This would give these applicants a smaller than 50 percent chance (with the precise number depending on the preferences of both their first and second choice judges) of consequently being matched to their second choice judge even if their first choice judge wanted them. This would provide *all* students (not just the 5 percent) with the ability to avoid any understanding that they would put Judge *A* first when they preferred Judge *B*, since no one would know which students' choices had been randomized; a candidate could simply say to Judge *A* (who thought an understanding with the candidate had been reached) that "randomization must have kicked in." It would be important not to set the threshold number of reports required for randomization too high, since receiving the sort of informal overture described above from a

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175 See id at 1000.

176 See Part IV.D.1.

judge might well produce sufficient excitement on the part of a clerkship candidate eager to put the process behind him or her that the candidate would not call even an anonymous hotline.

Hopefully the threat of randomization—and the statement that this would make about judges' behavior—would be enough to deter a sufficiently large number of judges from reaching informal understandings that the randomization would not ever have to kick in. But the knowledge that in any given year randomization *could* always kick in would help to deter such informal understandings in the first place, since there would be some question as to how reliable they would be. Even in years in which randomization would actually occur, it would, we think, probably produce fewer negative effects than the current system (although it should be acknowledged that the negative effects would be of a different character). Obviously the prospect of intentionally failing to put together pairs who want to be with one another is troubling and could certainly produce perceptions of unfairness; but so too is, and does, the current free-for-all.

## CONCLUSION

The hiring process for federal judicial law clerks has engendered intense dissatisfaction among both judges and students. Hiring occurs earlier and earlier—now often early in the student's second year of law school—and in a rushed, chaotic process that resembles a game of musical chairs, in which frequently neither judges nor students make their most desired matches. Efforts to reform the process have been attempted over the years, with a complete lack of success.

Our study has differed from the earlier literature on this baffling and frustrating issue in three major respects. First, we have placed the issue within the context of economic theory that identifies the incentives and constraints, and the private and social costs and benefits, that lead to the "unraveling" of certain markets. Second, we have situated the law clerk market within the range of markets that have exhibited similar problems and experienced a wide variety of attempted and achieved solutions. And third, we have conducted a far deeper and wider-ranging empirical survey of judge and applicant attitudes and behaviors than any previous students of this subject.

It would be nice to be able to report that on the basis of this research effort we have come up with a clear solution to the problem. But we have not. The problem is stubborn, intractable; this is plain as a matter of theory and as a matter of experience in this and other markets. The solutions that have been tried and sometimes succeeded in the other markets are unlikely to work as well in the law clerk market because of subtle differences we have discussed.

A mature appreciation of the recalcitrance of the world to reformers' efforts requires recognition that many social and economic problems cannot be solved and can only be lived with. Nevertheless, not being given to fatalism, we have suggested a partial solution, which would require judges who wish their clerks to be eligible for United States Supreme Court clerkships to enroll in a centralized matching system that would, for those judges and the students applying to them for clerkships, very largely eliminate the congestion, information, and resulting mismatching problems of the present system. More generally, we believe strongly that the Supreme Court could play an important and productive role in helping to organize and improve the market for federal judicial law clerks. We commend our suggested solution to the attention of the relevant decisionmakers. But we hope that apart from its merits and any criticisms that may be lodged against it, our study will be seen to have permanent value in framing and illuminating a most interesting, if difficult, market problem.

# DATA APPENDIX

## TABLE A1
### RESPONSE RATES BY SENIORITY STATUS AND CIRCUIT—1999 AND 2000 JUDGE SURVEYS

| Group of federal appellate judges | Number of judges surveyed | | Number of judges responding | | % of surveyed judges responding | |
|---|---|---|---|---|---|---|
| | *1999* | *2000* | *1999* | *2000* | *1999* | *2000* |
| All judges | 238 | 238 | 155 | 129 | 65% | 54% |
| Active judges | 161 | 159 | 103 | 84 | 64% | 53% |
| Senior judges | 77 | 79 | 51 | 45 | 66% | 57% |
| Senior status not listed | N/A | N/A | 1 | 0 | N/A | N/A |
| 1st Circuit | 11 | 10 | 8 | 7 | 73% | 70% |
| 2nd Circuit | 20 | 21 | 9 | 10 | 45% | 48% |
| 3rd Circuit | 18 | 19 | 13 | 13 | 72% | 68% |
| 4th Circuit | 16 | 13 | 10 | 6 | 63% | 46% |
| 5th Circuit | 20 | 19 | 9 | 10 | 45% | 53% |
| 6th Circuit | 23 | 22 | 16 | 11 | 70% | 50% |
| 7th Circuit | 13 | 15 | 10 | 9 | 77% | 60% |
| 8th Circuit | 17 | 18 | 11 | 15 | 65% | 83% |
| 9th Circuit | 40 | 43 | 27 | 17 | 68% | 40% |
| 10th Circuit | 16 | 15 | 11 | 8 | 69% | 53% |
| 11th Circuit | 18 | 17 | 11 | 8 | 61% | 47% |
| D.C. Circuit | 11 | 11 | 7 | 6 | 64% | 55% |
| Federal Circuit | 15 | 15 | 11 | 9 | 73% | 60% |
| No circuit listed | N/A | N/A | 2 | 0 | N/A | N/A |

*Sources*: 2 *Almanac of the Federal Judiciary* (Prentice Hall 1999) (1999 data on active and senior judges); *Judicial Yellow Book* (Spring 2000) (2000 data on active and senior judges); 1999 and 2000 Judge Surveys (survey response rates).

## TABLE A2
## THE IMPORTANCE OF MEMBERSHIP IN THE SCHOOL'S MAIN LAW REVIEW TO JUDGES' HIRING DECISIONS

| **Ranking of the importance of membership in the school's main law review**[a] | **Number of judges** | **Cumulative %** |
|---|---|---|
| 1 | 6 | 5% |
| 2 | 23 | 25% |
| 3 | 11 | 34% |
| 4 | 14 | 47% |
| 5 | 8 | 53% |
| 6 | 8 | 60% |
| 7 | 7 | 66% |
| 8 or below[b] | 7 | 72% |
| a factor, but not ranked | 7 | 78% |
| not a factor | 25 | 100% |
| *Total number of judges responding*: 116 | | |

*Source*: 2000 Judge Survey.

[a] Ties in rankings were resolved by assuming that law review membership received the higher ranking, so if anything the data reported here *overstate* the importance of law review membership.

[b] Some judges wrote in additional selection criteria, so it was possible for one of our eight listed criteria to receive a ranking below 8.

## TABLE A3
## REPRESENTATION OF STUDENTS FROM TOP LAW SCHOOLS IN FEDERAL APPELLATE CLERKSHIPS

| Institution | *U.S. News & World Report* Ranking | Number of Law Clerks | Size of Class |
|---|---|---|---|
| *Top four*: | | | |
| Yale | 1 | 45 | 192 |
| Stanford | 2 | 16 | 182 |
| Harvard | 3 | 56 | 552 |
| Chicago | 6 | 26 | 188 |
| *Total* | | 143 | 1114 |
| *Next six*: | | | |
| NYU | 4 | 21 | 443 |
| Columbia | 5 | 22 | 389 |
| Michigan | 7 | 13 | 356 |
| Berkeley | 8 | 13 | 282 |
| Virginia | 9 | 17 | 363 |
| Cornell | 10 | 7 | 182 |
| *Total* | | 93 | 2015 |
| *Next ten*: | | | |
| Duke[a] | 10[a] | 10 | 214 |
| Northwestern | 12 | 10 | 217 |
| Penn | 13 | 4 | 252 |
| Georgetown | 14 | 20 | 587 |
| Texas | 15 | 4 | 470 |
| UCLA | 16 | 10 | 319 |
| USC | 17 | 1 | 203 |
| Vanderbilt | 18 | 4 | 187 |
| Minnesota | 19 | 2 | 235 |
| Washington & Lee | 20 | 3 | 122 |
| *Total* | | 68 | 2796 |

*Sources*: <http://www.usnews.com/edu/beyond/gradrank/law/gdlawtl.htm> (visited Aug 17, 2000) (*U.S. News* rankings and number of J.D. students (divided by three to get class size)); *Judicial Yellow Book* (Spring 2000) (law clerk data).

[a] Tied with Cornell.

## TABLE A4
### RESPONSE RATES OF STUDENTS BY SCHOOL AND BY APPLICANT STATUS (1999 STUDENT SURVEY)

| Group | Number of students responding | Number of respondents who applied for federal clerkships in 1998–1999 |
|---|---|---|
| *All seven schools* | 337 | 143 |
| *Top four schools*: | | |
| Yale | 51 | 33 |
| Stanford | 72 | 24 |
| Harvard | 114 | 40 |
| Chicago | 30 | 13 |
| *Total* | 267 | 110 |
| *Other schools surveyed*: | | |
| Columbia | 26 | 13 |
| Michigan | 13 | 5 |
| Vanderbilt | 31 | 15 |
| *Total* | 70 | 33 |

*Source*: 1999 Student Survey.

## TABLE A5
### HIRING OF THIRD-YEAR AND POST-GRADUATE CANDIDATES (1999–2000)

| | |
|---|---|
| Percent of judges whose hiring of third-year students for 2001–2002 clerkships was: | |
| Higher than | 10% |
| Lower than | 13% |
| About the same as | 78% |
| their level of hiring of third-year students in previous years (94 responses total)[a] | |
| Percent of judges whose hiring of post-graduates for 2001–2002 clerkships was: | |
| Higher than | 10% |
| Lower than | 13% |
| About the same as | 77% |
| their level of hiring of post-graduates in previous years (93 responses total) | |
| Number of third-year students hired for 2001–2002 clerkships as of the date of the judge survey (106 responses total) | 35 |
| As a percent of total hires completed at the time of the judge survey[b] | 12% |
| Number of post-graduates hired for 2001–2002 clerkships as of the date of the judge survey (105 responses total) | 38 |
| As a percent of total hiring completed at the time of the judge survey[b] | 13% |

*Source*: 2000 Judge Survey.

[a] Percentages given sum to 101 percent as a consequence of rounding.

[b] 300 total completed hires were reported by judges responding to the survey.

## TABLE A6
### JUDGES' REASONS FOR MAKING OFFERS BEFORE COMPLETING SCHEDULED INTERVIEWS

| Survey | Judge's reason for making offers before completing scheduled interviews |
|---|---|
| 1999 Survey #105 | Avoid loss to other judge(s). |
| 1999 Survey #73 | Because candidates were already accepting offers elsewhere. |
| 1999 Survey #18 | Because I had to compete with other offering judges. |
| 1999 Survey #91 | Because I really liked her and everything moved so fast this year—plus, so many were dropping out before they interviewed with me. In any event, she took a position with the judge she interviewed with after me—see below. |
| 1999 Survey #106a | Because I told each interviewee that I would be prepared to consider making an offer should they be pressed by another judge and required to accept within a specified period of time. |
| 1999 Survey #36 | Because I was pretty certain the candidate would receive an offer instanter! |
| 1999 Survey #112b | Because if I see a candidate I like I give them an offer. |
| 1999 Survey #90 | Because of the issue in the previous question [referring to cancellations of interviews by applicants]. |
| 1999 Survey #8 | Because other judges were hiring candidates away. |
| 1999 Survey #38 | Because other judges were making offers to students that I was interviewing. |
| 1999 Survey #42 | Competition. |
| 1999 Survey #33 | Did not want to lose outstanding applicants. |
| 1999 Survey #22 | Excellent candidate I didn't want to lose. |
| 1999 Survey #45 | Excellent candidate who had other options. |
| 1999 Survey #31 | Hired one exceptionally qualified candidate on the spot (figured she'd be gone if I waited). |
| 1999 Survey #112 | I found a good candidate and didn't want to lose him/her. |
| 1999 Survey #53b | I had to act fast as this candidate was sure to receive other offers in the days ahead. |
| 1999 Survey #17 | I learned from experience that if I waited to complete all interviews before making offers quite a few applicants would withdraw. |
| 1999 Survey #25 | I thought I would lose good prospects if I didn't. |

## TABLE A6
## JUDGES' REASONS FOR MAKING OFFERS BEFORE COMPLETING SCHEDULED INTERVIEWS (CONTINUED)

| Survey | Judge's reason for making offers before completing scheduled interviews |
|---|---|
| 1999 Survey #8d | If I liked a candidate, I made an offer at the interview. The reason I did not want to wait until all interviews were over was to minimize the risk of losing candidates who would want to clerk for me. |
| 1999 Survey #67 | Impression that many offers with short deadlines were being made. |
| 1999 Survey #30 | My staff consists of 4 clerks and 1 secretary. I had to recruit a whole staff (including a new secretary) in early 1999. One of my most promising applicants notified me she had been hired by one of my colleagues in November or December 1998. Under these circumstances, I felt that I had to accelerate my recruitment as much as possible. |
| 1999 Survey #104 | Otherwise they would be gone, based on prior years. |
| 1999 Survey #3d | Outstanding applicants who would be taken by another judge if I did not act. |
| 1999 Survey #82 | Perceived competition from other judges. |
| 1999 Survey #24 | Pressured by a student to match an offer. |
| 1999 Survey #187 | Satisfaction with candidate, desire not to lose candidate to another offer. |
| 1999 Survey #18c | So as to be able to compete. |
| 1999 Survey #21 | So other judges would not hire someone I really thought highly of. |
| 1999 Survey #53 | The best candidates disappear fast. |
| 1999 Survey #97 | To keep from losing a good clerk to some other judge. |
| 1999 Survey #99 | To prevent that applicant from being hired by someone else before I completed interviews. |
| 2000 Survey #69 | A bird in the hand .... |
| 2000 Survey #41 | Afraid they would be hired by someone else. |
| 2000 Survey #75 | Applicant already had an offer. |
| 2000 Survey #73 | As I learned recruiting for a law firm, it is an effective and necessary procedure. |
| 2000 Survey #45 | Because applicants had other offers already. |
| 2000 Survey #119 | Because if I see a good applicant, I want to make an offer before the person has been hired. |

## TABLE A6
## JUDGES' REASONS FOR MAKING OFFERS BEFORE COMPLETING SCHEDULED INTERVIEWS (CONTINUED)

| Survey | Judge's reason for making offers before completing scheduled interviews |
|---|---|
| 2000 Survey #46 | Because the candidate was so good, I knew from experience that she would receive and probably accept another offer if I waited any longer. |
| 2000 Survey #33a | Competition and pressure to finish. |
| 2000 Survey #28 | Good candidate—would have accepted another offer. |
| 2000 Survey #80 | I did this for the first time ever, because almost none of the interviewees wanted to take my 2-year position, and this excellent candidate did; plus the candidate said that the school had instructed the students that they "had" to take the first offer given, and the candidate was headed immediately for additional interviews. |
| 2000 Survey #76 | I started late (later than other judges) and good candidates were being hired by other judges. |
| 2000 Survey #37 | If I think a candidate would be an excellent choice I like to wrap up my efforts and leave it to the candidate. Also, the longer the process drags on, the more likely that someone else will make him/her an offer resulting in nothing to show for our efforts. |
| 2000 Survey #114 | Obtain clerk who was offered another clerkship. |
| 2000 Survey #5 | Outstanding applicant who would be hired by another judge if I did not act. |
| 2000 Survey #43 | Rolling admission to keep from losing clearly acceptable clerk applicant. |
| 2000 Survey #74a | To avoid losing the really good applicants. |
| 2000 Survey #100 | To hire a good candidate before someone else did. |
| 2000 Survey #18 | To meet competition. However, at all times I had at least two offers open. |

*Source*: 1999 and 2000 Judge Surveys.

## TABLE A7
## STUDENT COMMENTS ABOUT THE DECISION NOT TO APPLY–CONCERNS ABOUT THE NATURE OF THE PROCESS AND EARLY HIRING (1998–1999)

| Survey | Comment |
|---|---|
| Survey #199 | [The market] certainly seems like a hellish experience and that definitely contributed to my decision not to apply. |
| Survey #210 | [My decision not to apply] was at least in part because of disgust with the process. |
| Survey #202 | I think the current system is absurd and I have yet to hear a sufficient rationale for it. Frankly, I chose not to apply not because I am uninterested, but because of the process. |
| Survey #211 | The reason I chose not to [apply] was . . . I was exhausted from fall interviews and was not ready to begin the process again. [Also,] I had spoken with many people about it and their tremendous frustration with the process discouraged me. |
| Survey #196 | Terrible market. The reason I did not apply was [that] I was burnt out from 2L law firm interviewing and because it forced me to decide to[o] early where I wanted to be two years from now. And the process is a hodgepodge lottery. |
| Survey #16 | The biggest concern that I had was that I had to be getting my application packets together so that they could go out in Dec.–Jan. That meant that the more judges I would apply to, the less time I would have to study for finals etc. |
| Survey #201 | [The process] was especially not attractive so soon after the 2L summer job search. |
| Survey #14 | [The] scheduling [of the market] (time of year when students must apply) is tremendously inconvenient. [This is part of the reason that] I, while theoretically very interested, chose not to apply. I hope too many others weren't similarly dissuaded. |

*Source*: 1999 Student Survey.

## TABLE A8
### TIMING OF THE MARKET BY CIRCUIT

| | Number of judges from circuit | | Number of judges as a % of total responses from circuit | |
|---|---|---|---|---|
| | *1998–1999* | *1999–2000* | *1998–1999* | *1999–2000* |
| *Started interviewing and making offers by Jan. 31:* | | | | |
| 1st Circuit | 2 | 4 | 40% | 80% |
| 2nd Circuit | 1 | 5 | 14% | 63% |
| 3rd Circuit | 0 | 6 | 0% | 55% |
| 4th Circuit | 5 | 2 | 71% | 100% |
| 5th Circuit | 4 | 6 | 57% | 75% |
| 6th Circuit | 4 | 6 | 29% | 75% |
| 7th Circuit | 1 | 6 | 14% | 86% |
| 8th Circuit | 3 | 9 | 33% | 64% |
| 9th Circuit | 8 | 13 | 40% | 93% |
| 10th Circuit | 2 | 7 | 18% | 88% |
| 11th Circuit | 0 | 3 | 0% | 50% |
| D.C. Circuit | 3 | 6 | 43% | 100% |
| Federal Circuit | 2 | 2 | 20% | 25% |
| *Total* | 35 | 75 | 28% | 71% |
| *Done with interviews and offers by Jan 31:* | | | | |
| 1st Circuit | 2 | 4 | 40% | 80% |
| 2nd Circuit | 1 | 5 | 14% | 63% |
| 3rd Circuit | 0 | 5 | 0% | 45% |
| 4th Circuit | 2 | 2 | 29% | 100% |
| 5th Circuit | 2 | 5 | 29% | 63% |
| 6th Circuit | 1 | 5 | 7% | 63% |
| 7th Circuit | 0 | 5 | 0% | 71% |
| 8th Circuit | 1 | 8 | 13% | 57% |
| 9th Circuit | 5 | 11 | 25% | 79% |
| 10th Circuit | 1 | 7 | 9% | 88% |
| 11th Circuit | 0 | 3 | 0% | 50% |
| D.C. Circuit | 3 | 6 | 43% | 100% |
| Federal Circuit | 2 | 1 | 20% | 13% |
| *Total* | 20 | 67 | 16% | 64% |

*Source*: 1999 and 2000 Judge Surveys.

**TABLE A9-1**
**STUDENT PERCEPTIONS REGARDING THE TIMING OF THE MARKET FOR FEDERAL JUDICIAL LAW CLERKS (1999–2000)**

| Survey | Comment |
|---|---|
| Survey #25 | I ended up having to miss the entire last week of classes to fly out to five or six interviews on the west coast, arriving back the day before my first exam for which I was entirely unable to study. . . . Although I'm happy (and lucky) to have ended up with what looks like an exciting job opportunity, I'm sure I'd perform better at it had I been able to catch the Establishment clause in Con law. |
| Survey #34 | To have a shot at appellate court clerkships you have to apply in the middle of [the student's law school's] interviewing season. It's ridiculous that the process is so front-loaded with lots of clerkships awarded in October and November. 2Ls in the fall have little by the way of writing samples and only one year's grades. |
| Survey #165 | Judges need to be sensitive to the fact that travelling in December imposes enormous costs. My fall grades reflect the fact that I did not have adequate time to pull together the course material. |
| Survey #263 | [T]he timing meant that some of us were interviewing during finals . . . , obviously a particularly bad time to be travelling and preparing well for an interview. |
| Survey #28 | Trying to apply for clerkships, do call back interviews [with law firms], 2nd year [moot court competition] and normal classwork was absolute hell. |
| Survey #32 | I couldn't postpone my interviews to study [for exams]. I believe that I experienced adverse effects on my performance as a result. |

*Source*: 2000 Student Survey.

## TABLE A9-2
## STUDENT PERCEPTIONS REGARDING THE TIMING OF THE MARKET FOR FEDERAL JUDICIAL LAW CLERKS—STATEMENTS ABOUT DIFFICULT THINGS IN THE HIRING PROCESS (1999–2000)

| Survey | "One of the most difficult things in the [clerkship hiring] process was" . . . |
|---|---|
| Survey #17 | Trying to schedule all of my interviews right before finals. |
| Survey #19 | Having to deal with the clerkship application process so soon after the fall summer job interviewing season. |
| Survey #55 | Scheduling during exam period. |
| Survey #58 | Sending out clerkship applications, deciding on summer work and studying for finals at the same time. |
| Survey #60 | Juggling clerkship applications, summer job interviews and finals. |
| Survey #165 | Scheduling and attending interviews during exam week. |
| Survey #166 | Scheduling interviews on week before finals. |
| Survey #169 | Trying to balance applications, interviews for summer associateships, . . . and studying. |
| Survey #196 | Dealing with clerkship and summer law firm process simultaneously. |
| Survey #199 | Ramping up . . . for application in the beginning of the 2nd year (while interviewing with firms). |
| Survey #206 | Having to interview during finals reading period. |

*Source*: 2000 Student Survey.

**TABLE A10**
**THE ROLE OF REFERENCES FROM CLASSMATES**

| Survey | Comment |
|---|---|
| 1999 Survey #154[a] | In an e-mail headed 'The Dish,' one Washington, D.C. clerk leaked me the names of my classmates who had made the judge's shortlist. In exchange for the gossip, he asked me to rank my peers. It didn't matter that I hadn't worked directly with them and knew nothing of their writing skills. It didn't matter that after a year and a half of law school, I had limited experience to know what makes a good clerk. |
| 1999 Survey #119 | On the D.C. Circuit, peer references were being used to extend interviews and offers. I think [it's] offensive that someone could get a desired clerkship because she had a good friend who made calls on her behalf. |
| 1999 Survey #164 | [A third-year student who would be clerking for a particular D.C. Circuit judge the following year] may have put the good word in. Judges called 3L's in law review. |
| 1999 Survey #122 | Third year law students play an enormous role. The clerks sort through the resumes and then call their buddies in the class below and ask who to interview. This was especially important when no one had any grades in to speak of because the process began so soon. |
| 1999 Survey #43 | A 3L friend from undergrad. at Harvard who will be clerking for [a particular judge] . . . established contact with clerks in particular chambers. |
| 2000 Survey #3 | [A] 3L (future clerk) . . . recommended me to his future judge. |

*Source*: 1999 and 2000 Student Surveys.

[a] This response took the form of a newspaper editorial that the student had written about the market for federal judicial law clerks.

## TABLE A11
## THE IMPORTANCE OF RECOMMENDATIONS FROM FAMILIAR PROFESSORS TO JUDGES' HIRING DECISIONS

| **Ranking of the importance of recommendation from a familiar professor**[a] | **Number of judges** | **Cumulative %** |
|---|---|---|
| 1 or 2 | 49 | 42% |
| 3 or 4 | 31 | 69% |
| 5 or below, or a factor but not ranked | 21 | 87% |
| not a factor | 15 | 100% |
| *Total number of judges responding*: 116 | | |

*Source*: 2000 Judge Survey.

[a] Ties in rankings were resolved by assuming that recommendations from a familiar professor received the higher ranking, so the data reported here may overstate the importance of such recommendations by a small margin.

[b] Some judges wrote in additional selection criteria, so it was possible for one of our eight listed criteria to receive a ranking below eight.

**TABLE A12**
**THE ROLE OF FACULTY CLERKSHIP BROKERS**

| Survey | Comment |
|---|---|
| 1999 Student Survey #134 | One of my professors gave me a glowing review when the judge called him, and 15 minutes later I got the offer. |
| 1999 Student Survey #116 | [Professor *X*] definitely got me several interviews by calling on my behalf. [Professor *Y*] got me at least the [interview with a particular prominent Eastern seaboard judge] ([that judge] told me), and probably [another judge]. |
| 1999 Student Survey #1 | [Dean *X*] got me the . . . interview [with a prominent Ninth Circuit judge]. |
| 1999 Student Survey #119 | One professor basically got me an interview with [a prominent D.C. Circuit judge]. |
| 1999 Student Survey #9 | One recommender took a very active role in the process. I can tell because he clerked for a particular judge who offered an interview, lobbied the judge on my behalf, and served as a messenger to let me know where the judge's hiring was going. He also called to discuss how I felt about different judges/circuits. |
| 1999 Student Survey #114 | One of my professors really wanted me to clerk for a particular judge. But that judge never called me. When I accepted a state clerkship, this professor was upset and called the judge who she wanted me to clerk for, only to find that the reason this judge hadn't called me was that she hadn't started interviewing yet. . . . This judge now thinks that I will reapply next year, and my guess is that she will at least interview me. |
| 2000 Student Survey #37 | My recommender got me many interviews I wouldn't have gotten on my own because he was friends with many judges. |
| 2000 Student Survey #167 | My professor nominated the judge I interviewed with. |

**TABLE A12**
**THE ROLE OF FACULTY CLERKSHIP BROKERS (CONTINUED)**

| Survey | Comment |
|---|---|
| 2000 Student Survey #235 | I told a professor whom I'm close to that I would very much like to interview with my 1st choice judge. At that point, the judge had not called me back after I told the chambers that I'd be in his city the following week. My professor made a call on my behalf. Immediately after the call, the judge called to tell me he'd be incredibly excited to see me. After the judge's call, my professor called me to make sure the judge called. I received my offer at the interview. Months later, when my judge sent a letter to all his 2001–2002 clerks describing the other clerks, he pretty much wrote in my description that he trusted "his friend" (my professor). |
| 2000 Student Survey #266 | One of my professors called the judge I will be clerking for and played an integral role in my getting the interview and clerkship. |
| 2000 Student Survey #252 | [The] dean of [the student's] law school, good friends with [a particular] judge, called him on my behalf. |
| 2000 Student Survey #209 | [V]arious [faculty from the student's school] played enormous roles getting me interviews with the three judges I applied to. |
| 2000 Student Survey #165 | [O]ne of my recommenders carried considerable weight with several judges. I was told several times that her name and recommendation secured my interview. |
| 2000 Student Survey #8 | A professor called to get me an interview despite the fact that all interviews had been filled. |
| 1999 Judge Survey #52 | [I] delegate[ ] [hiring] to [the] Clerkship Committee at a Law School. |

**TABLE A12**
**THE ROLE OF FACULTY CLERKSHIP BROKERS (CONTINUED)**

| Survey | Comment |
|---|---|
| 1999 Judge Survey #61 | I always take (or almost always) one law clerk from Harvard, recommended by my classmate, [Professor *Z*]. |
| 1999 Judge Survey #52 | [I have an] arrangement w[ith] [a] law school: I hire people we mutually agree on: The interview is a formality ([and] sometimes I hire w[ithout] interviews). |
| 2000 Judge Survey #70 | [A]t least one of my clerks is, in effect, picked by a certain law professor. |

*Source*: 1999 and 2000 Student Surveys; 1999 and 2000 Judge Surveys.